89-1028

No. ____

IN THE

Supreme Court of the United States

October Term, 1989

INDIANA COAL COUNCIL, INC. AND HUNTINGBURG MACHINERY & EQUIPMENT RENTAL, INC.,

Petitioners,

vs.

INDIANA DEPARTMENT OF NATURAL RESOURCES, WABASH VALLEY ARCHAEOLOGICAL SOCIETY, INC., AND COUNCIL FOR THE CONSERVATION OF INDIANA ARCHAEOLOGY, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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QUESTIONS PRESENTED

Pursuant to Indiana's version of § 522 of the federal Surface Mining Control and Reclamation Act of 1977, the State[1] designated a portion of Petitioner HUMER's land as an "area unsuitable" for surface coal mining and conditioned removal of the land-use restriction on HUMER's allowing archaeologic exploration, excavation and destruction of its property and payment of $50,000 for archaeologic services. The questions are:

1. Whether conditioning the removal of the land use restriction on HUMER's accession to State sponsored entry, archaeologic exploration, excavation, use, destruction and appropriation of HUMER's property without compensation, is a taking contrary to the Fifth and Fourteenth Amendments?

A. "Had" Indiana "simply" entered and conducted an archaeologic excavation and study on HUMER's land, "rather than conditioning" the removal of a land use restriction on HUMER's allowing and arranging for such, "would this have been a taking." [*Nollan v. California Coastal Commission*, 483 U.S. 825, 831 (1987)].

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[1] The parties to the proceedings below were Petitioners, Indiana Coal Council, Inc. ("ICA") and Huntingburg Machinery & Equipment Rental, Inc. ("HUMER") and Respondents, Indiana Department of Natural Resources, (alternately referred to as "DNR," the "Director" and the "State"), Wabash Valley Archaeological Society, Inc. and Council for the Conservation of Indiana Archaeology, Inc. ("Archaeologists"). Petitioners ICA and HUMER have no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1. The federal Surface Mining Control and Reclamation Act of 1977 ("SMCRA") is codified at 30 U.S.C. § 1201 *et seq.*, with §522 being at 30 U.S.C. §1272. Indiana's version of §522 is at Ind. Code §13-4.1-14-1 *et seq.*

B. "If so," whether requiring HUMER, without compensation, to allow and arrange for an archaeologic exploration, excavation, and study as well as the necessary financing, "as a condition" to the removal of a land use restriction, "alters the outcome." [*Nollan*, 483 U.S. at 834].

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Indiana, entered in the above-entitled proceeding on August 31, 1989.

OPINIONS BELOW

The opinion of the Supreme Court of Indiana (542 N.E.2d 1000), the decision of the Dubois Circuit Court, and the Findings and Order of the Director of the DNR are reprinted in the Appendix ("App.") hereto, at A1, A15, and A34, respectively.

JURISDICTION

The judgment of the Court below was entered at 10:00 a.m., August 31, 1989. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) to review the judgment below by Writ of Certiorari. The time for filing this petition for Writ of Certiorari, originally due November 29, 1989 pursuant to 28 U.S.C. §2101(c), has been extended (Application No. A406, granted November 29, 1989) to and including December 29, 1989.

CONSTITUTIONAL PROVISIONS, STATUTES AND ADMINISTRATIVE REGULATIONS INVOLVED

U.S. CONST. amends. V and XIV, Ind. Code § 13-4.1-14-1, *et seq.*, and 310 IAC §§ 12-2-2 *et seq.* are set forth in the Appendix hereto at pp. A57, A58, A60, and A64, respectively.

STATEMENT OF CASE

DNR Order — Condition to Removal of Land Use Restriction. The Archaeologists petitioned the Indiana DNR to prohibit the land use of surface coal mining on a portion of HUMER's 300 acre farm pursuant to the Indiana version of Section 522 of federal SMCRA, (Ind. Code § 13-4.1-14-2, 4 and 30 U.S.C. § 1272) [App. A61] based on a portion of the acreage containing unrecovered archaeologic matter. After an

adjudicatory hearing, on January 3, 1986, the DNR issued a final order designating the archaeologic site [Beehunter Site] as unsuitable for surface coal mining based on the presence of important archaeologic matter *under* the plow zone, but providing that the land use restriction "will terminate if" [App. A46] an archaeologic exploration, excavation, dig, analysis, writing and a published report were accomplished pursuant to detailed requirements set forth in an accompanying "Mitigation Plan" by archaeologists to be approved by the State and subject to State inspections and sanctions to enforce the plan. [App. A47, A50]. The DNR Order made no provision for payment of the archaeologists, compensation to HUMER for the use and excavation of the land, including ingress and egress, or for damage to the land caused by the excavation.

Trial Court Remand Regarding HUMER Mitigation Plan. The DNR Order was appealed to the Dubois Circuit Court where the DNR findings concerning the Beehunter Site containing important archaeologic data were affirmed, but reversed the order based on the Fifth and Fourteenth Amendment objections, remanding the matter to the DNR for further consideration of HUMER's Mitigation Plan [App. A26, A33]. HUMER's Mitigation Plan [App. A52-A56, R. 351-358] differed from the DNR Order largely in that HUMER would not be required to pay the Archaeologists (approximately $50,000) and further HUMER would be compensated for any damage caused by the excavation of the land, while HUMER offered to forego compensation for loss of use of the Site, as well as for loss of use with respect to ingress and egress.

The trial court, based largely upon *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (finding a conditionally required conveyance of an easement for the removal of a land use restriction as violating the Takings Clause),[2] rea-

[2] The federal taking question was raised by Petitioners in their opening brief before the Dubois Circuit Court, filed August 11, 1986, and before the Supreme Court of Indiana in the appellate briefs. The Dubois Circuit Court decided the federal takings question in favor of Petitioners [A15] but was reversed by the Indiana Supreme Court, App. at A1.

soned that the condition (an archaeologic exploration, excavation and study), if attempted directly by the State, would constitute a *per se* take; that the State interest being advanced was acquisition of the knowledge with preservation being but a prelude to acquisition, since, without exploration and excavation, the Site has no informational value; and that acquiring the knowledge, while a sufficient public purpose to support condemnation, without compensation, was an illegitimate State interest pursuant to *Nollan*. [Findings 49-52; Conclusions 7-11; App. A25-A26; A28-A30]. Hence, the trial court reversed the DNR Order remanding the case for further consideration of HUMER's Mitigation Plan.

Facts. The salient facts and conclusions are largely uncontested. The Beehunter Site presents the opportunity to develop and obtain important historic and cultural "knowledge." However, archaeologic matter is below the surface and inaccessible. Unless excavated and analyzed at some point, the Site has no informational value. [Finding 50; App. A25-A26]. Preservation alone yields no knowledge. This "knowledge" can be gained only by entry, ingress and egress, excavation and destruction of the Site through an archaeologic exploration with the application of $50,000 of archaeologic services, including excavating and digging the Site, sifting, recordation, analysis and a published report. During the archaeologic excavation, the Site has no other possible use, including farming. Subsequent to the archaeologic excavation, the Site has no archaeologic value and unless properly reclaimed (and no provision for reclamation is made in the DNR mitigation plan) will result in permanent damage to the land. The costs set forth above do not include the reclamation cost. [Findings 9, 20-53; App. A17, A20-A26.]

The Archaeologists presented testimony that the major problem to the development of archaeologic knowledge is destruction of a site before archaeologic excavation can be accomplished. The major problems for the accomplishment of an archaeologic excavation and dig are accessibility and fund-

ing. The development of archaeologic information is a not-for-profit activity and funds come only from government sources or grants. [R. 1806-1811]. There is no economic justification for a landowner to accomplish such. [Finding 49; Conclusion 17; App. A25, A31]. The concept of preservation as applied to an archaeologic site is "mothballing" the site for future study. [R. 1859].

Surface coal mining before an archaeologic exploration will destroy the opportunity for exploration and knowledge. After an archaeologic exploration, with attendant removal of archaeologic matter from the Site, surface mining would have no adverse effect. An archaeologic excavation will permanently damage the land for farming, unless the land is properly reclaimed.

The Beehunter Site has been for some time part of the HUMER family farm comprising in excess of 300 acres. The coal underneath the Site is approximately 6% of the coal under the entire farm. By surface mining, removal of 100% of the coal can be achieved. If surface mining cannot be accomplished, and underground or auger mining is possible, approximately 40% of the coal under the Site would be lost. [App. A6-A7; Finding 38; App. A23-A24] At the time of the Archaeologists' Petition, there was pending before the DNR an application for a permit to conduct surface coal mining on the farm. [App. A25; Finding 47].

Indiana Supreme Court Decision. The Indiana Supreme Court reversed the trial court, ordering reinstatement of the DNR Order, and finding no violation of the Fifth and Fourteenth Amendments. The Indiana court had two alternate rationales for finding that *Nollan* did not require that the condition to the removal of the land use restriction as presented by the DNR Order was unconstitutional.[3]

[3] The Indiana Court in the first part of the opinion undertook an economic impact analysis as to the effect of the land use restriction which, under *Nollan* is not necessary to finding an unconstitutional taking as to a state's conditioning the removal of a land use restriction on a landowner's accession to an otherwise *per se* taking.

The Indiana court held that *Nollan* was applicable only where the condition required an actual conveyance of property [App. A10] and that the DNR Order was not "requiring any conveyance." [App. A10, A11.] Further, the court reasoned that HUMER was "free to continue the present use of farming" and was "required to do nothing." [App. A11]. The Indiana court did recognize that had the State made an "outright demand for access . . . to conduct an archaeologic dig by State employed archaeologists," such would have been a taking as held in *State Highway Commission v. Ziliak*, 428 N.E.2d 275 (Ind. App. 1981) [App. A11].[4] However, the Indiana court concluded that here, the State was "not seeking to physically occupy the land." The State purpose was described by the Indiana court as "only attempting to *preserve* the information at Beehunter *until* any qualified archaeologist can *recover* it." [App. A10, A11, emphasis added.] Hence, as opposed to a conditional *per se* take, the DNR Order was held to be "mere regulation."

Insofar as *Nollan* might require a heightened level of scrutiny as to the ends, means and nexus where a State creates a condition to the removal of the land use restriction, the Indiana court found that this Court in *Nollan* "did not adopt any particular level of scrutiny to be applied across the board to all takings . . . ." and whatever the heightened scrutiny this Court required, "it clearly extends only to . . . where the government requires an actual conveyance of property as a condition to removal of a land use restriction." [App. A10].

As an alternate basis for its holding, the Indiana court attempted [App. A11] to bring the DNR Order within the confines of *Nollan's* statement that a State might require a "concession of property rights" in a condition to the removal of the use restriction which "serves the same end" or the "same government purpose" as the land use restriction, 483 U.S. at

[4] In *State Highway Commission v. Ziliak*, 428 N.E.2d 275 (Ind. App. 1981) the Court held that the State could only conduct an archaeologic exploration and dig pursuant to condemnation power with compensation and that otherwise it was an unconstitutional taking.

836. The Indiana court then held that, even viewing the DNR Order as requiring the concession of a property interest as a condition to the removal of a land use restriction, the DNR Order complied with *Nollan's* statement since "the purpose of [the condition] . . . is *consistent with* the legitimate government interest served by the prohibition itself: preservation of areas culturally significant to our heritage." [App. A11, emphasis added]. Apparently, the Indiana court deemed that the "ends" of the condition and the land use restriction need not be the same, but only "consistent with" each other.

REASONS FOR GRANTING THE WRIT

I. Summary

Contravention of Nollan. The Indiana Supreme Court acknowledged that had Indiana made an outright demand for entry and exploration, excavation, recovery and scientific analysis of an archaeologic site on HUMER's land with State employed archaeologists without compensation, this would constitute a *per se* take. This Court's decisions require no less.

However, the Indiana court found that the State could achieve the same result, and more, without violating the Takings Clause through a condition to the removal of a land use restriction on the Beehunter Site which requires HUMER, without compensation, to allow and arrange for archaeologic excavation and study by State approved archaeologists, subject to State inspection, and without any provision for payment of the State approved archaeologists.

The Indiana court approved this "out-and-out plan of extortion" only by thoroughly emasculating *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Specifically, the Indiana court violated *Nollan*, by: (1) holding that the landowner's option under the condition to continue the *status quo* use and avoid an otherwise *per se* take serves to insulate the State's action from taking scrutiny; (2) equating the heightened scrutiny standard required by *Nollan* with a rational basis

test; (3) holding, in the alternative, that *Nollan's* heightened scrutiny is limited to where an "actual conveyance of property" is required as a condition to the removal of a land use restriction; (4) dispensing the State from *Nollan's* requirement that the condition serve the "same end," the "same government purpose" as that sought by the restriction, by requiring merely that the condition be "consistent with" the end sought by the restriction; and (5) confusing valid public uses/purposes sufficient to support condemnation with "legitimate State interests" under *Nollan*.

The "historic knowledge," available only by and after entry, exploration, and excavation of Beehunter undoubtedly enhances the general welfare and is undisputedly a proper public purpose or use to sustain eminent domain. However, this public purpose is not a "legitimate State interest" to support uncompensated appropriation in the takings and land use context. The burden of gaining such knowledge is one which in all fairness, under the dictates of this Court's takings precedents, must be borne by the public at large, not individual landowners. Indeed, any other result would obviate the very need for eminent domain power by giving constitutional warrant to a form of "*de facto* condemnation" without compensation.

National Import of Decision. The national impact of the Indiana court's decision is beyond question. Indiana's version of the "areas unsuitable" provisions of SMCRA, and attendant administrative regulations, as applied[5] to HUMER and the Beehunter Site, are but one of 27 similar statutory and regulatory schemes passed by states desirous of obtaining

[5]Unlike *Hodel v. Indiana*, 452 U.S. 314 (1981), this case does not present a facial challenge to any provision of the federal or Indiana SMCRA. As the Indiana court recognized, [App. A8] Petitioners challenge action of the DNR in designating the Beehunter Site as an area unsuitable for surface mining as applied to HUMER and the Beehunter Site.

exclusive jurisdiction over these matters.[6] If permitted to stand, the judgment below will serve as precedent for similar conditions to the removal of land use restrictions as to archaeologic sites in 26 other states. The facts at bar can be replicated in thousands, if not hundreds of thousands, of instances in these states. Further, the Indiana court's rationale is, of course, not limited to conditions to removal of coal-related land use restrictions. A myriad of conditional land use restrictions can now be used to shift the state burden for archaeologic research and excavation onto private landowners.

II. Judgment Below Contravenes Nollan

A. Takings Analysis and Standards of Scrutiny for Conditional Takings to Removal of Land Use Restrictions.

This Court has established the takings analysis applicable where a state conditions the removal of a land use restriction on an owner's accession to a physical intrusion amounting to a *per se* taking. *Nollan* (finding a permit to build conditioned on uncompensated grant of an easement contrary to the Takings Clause). The conditional nature of the scheme, through a landowner's option to continue present use and avoid the condition, does not protect the scheme from violating the Takings

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[6]In order to obtain jurisdiction pursuant to SMCRA § 503, 30 U.S.C. § 1253, states must enact legislation similar to federal SMCRA. The following are state counterparts to federal SMCRA, § 522, codified at 30 U.S.C. § 1272: Ala. Code § 9-16-96, Alaska Statutes § 27.21.260, Ark. Statutes § 52-9-26, Colo. Surface Mining Rule 7, Ill. Acts § 96½. ¶ 7907.02, Ind. Code § 13-4.1-14-1 *et seq.*, Iowa Code § 5-83.8, Kan. Mine Land Conservation and Reclamation Rules, Rule 762.11, 405 Ky. Administrative Regulations 24: 020, La. Rev. Stat. § 30-9-22, Md. Nat. Res. Code § 7-505.1, Mich. Comp. Laws § 425.2001, Miss. Code § 53-9-71, Mo. Stat. § 23.444.890, Mont. Code § 82-4-228, N.M. Stat. § 69-25 A26, N.D. Cent. Code § 38-14.1-05, Ohio Rev. Code § 1513.073, Ok. La. Stat. § 45-8B-781, Pa. Stat. § 52.6.1396.4.5, S.D. Code Laws § 45-6B-33, 400 Rules of Tenn. Dept. of Conservation, Div. of Surface Mining, § 1-9-.06, Tex. Rev. Stat. § 5920-11-33, Utah Code § 40-10-24, Va. Code § 45.1-252, W. Va. Code § 22A-3-22, and Wyo. Stat. § 35-11-425.

Clause.[7] Where the condition involves an owner's accession to an otherwise *per se* take, this Court requires a level of judicial scrutiny higher than a "rational basis" to determine whether there is a "legitimate state interest" which the condition "substantially advances" and whether such interest is the "same" as the purpose of the land use restriction.[8]

Further, this Court held that the field of "legitimate state interests" is narrower than those valid public purposes or uses

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[7] The *Nollan* Court held, "Had California simply required the Nollans to make an easement across their beach front available to the public . . . rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking.

* * * *

Given, then, that requiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment, the question becomes whether requiring it to be conveyed as a condition for issuing a land-use permit alters the outcome." [483 U.S. at 831, 834]. The Court below correctly acknowledges, as required by this Court's precedents, that had the state "demanded access" to Petitioner's property "outright," a *per se* take would exist, citing *State Highway Commission v. Ziliak*, 428 N.E.2d 275 (Ind. App. 1981). [App. A11].

[8] As to the "standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter," the *Nollan* Court held that, "our opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved . . . *not that the State 'could rationally have decided'* the measure adopted might achieve the State's objective. . . . [T]here is no reason to believe . . . that so long as the regulation of property is at issue the standards for takings challenges, due process challenges and equal protection challenges are identical; any more than there is any reason to believe that so long as the regulation of speech is at issue, the standards for due process challenges, equal protection challenges, and First Amendment challenges are identical." [483 U.S. at 834-35, and n. 3]. [Citations omitted, emphasis added].

within the scope of the police or takings power.[9] A conditional physical intrusion to the removal of a land use restriction implicates the State's scheme as being for the tacit purpose of avoiding the compensation requirement.[10] In one manner or another, the Indiana Supreme Court managed to vitiate each of these holdings.

B. Indiana Supreme Court Rules Contrary to Nollan that the Conditional Nature of DNR Order Avoids the Taking.

The archaeologic exploration and excavation required as a condition to removal of the land use restriction, if accomplished directly by the State with "State employed archaeologists," admitted the Indiana Supreme Court, would have been a take.[11] Indeed, this Court's decisions require no less, in view of

[9] This Court held: "Whatever may be the outer limits of 'legitimate state interests' in the takings and land use context, this [obtaining an easement to serve some valid governmental purpose, but without payment of compensation] is not one of them." [483 U.S. at 837]. This Court has found valid "public uses" for takings purposes to be coterminous with the broad scope of a state's police powers. *Keystone Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 491 n.20 (1987).

[10] The *Nollan* Court held: "We are inclined to be particularly careful about the adjective ["*substantial* advancement"] where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective." [483 U.S. at 841].

[11] The Indiana court held: "The extent of the intrusion here does not rise to the level of that in *Ziliak* where the *State made an outright demand for access* to the owner's land to conduct an archaeological dig by *state-employed archaeologists*." [App. A11, emphasis added]. To the extent that the Indiana Supreme Court attempted to articulate a constitutional difference between appropriation by "State-employed archaeologists" and private archaeologists, such is contrary to the dictates of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). A physical intrusion sponsored by the State "is a taking without regard to whether the State, or . . . party authorized by the State, is the occupant." *Loretto*, 458 U.S. at 432, n. 9. Furthermore, the Indiana court at this point totally ignored that the DNR's Mitigation Plan requires State approval of the archaeologist, as well as State inspections and enforcement of the archaeologic dig. [App. A11; A47, A50].

the myriad of property interests invaded, used, acquired, or damaged by compliance with the State's mitigation plan.[12] Yet, in direct conflict with *Nollan* the Indiana Supreme Court found that the DNR order conditioning removal of the land use restriction was not a taking, but "mere regulation," because "HUMER is required to do nothing and it is free to continue the present use of farming the land in question."[13] [App. A10-A11]. In effect, the Indiana court held that the conditional nature of an otherwise *per se* take is sufficient to protect the condition against a takings challenge.

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[12] It is undisputed that compliance with the Director's mitigation plan affirmatively requires HUMER to permit an extensive physical intrusion on its land by archaeologists, including: (1) entry (above and below the surface), with exploration and excavation of the Site through and below the plow zone; (2) Total use of the Beehunter Site to the exclusion even of HUMER; (3) ingress and egress routes to Beehunter; (4) use of any artifacts; (5) permanent damage to the land for farming; (6) loss of $50,000 to underwrite the excavation and study of Beehunter; and (7) public use of and benefit from archaeologic work product in a published report for which HUMER will have paid. Invasions far less extreme or extensive than the total upheaval and digging into, through and below the plow zone throughout six acres, have resulted in takings under this Court's decisions. *Loretto v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419 (1982) (placement of small cable television installation without compensation was a take); *Nollan, supra*, (government-enforced permanent third-party use of an easement); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (government enforced permanent third-party use where a usufructory interest was found sufficient as the basis of a compensable taking); *Hodel v. Irving*, 481 U.S. 704 (1987) (destruction of expectancy by inheritance sufficient to constitute a taking); and *First English Church v. County of Los Angeles*, 482 U.S. 304 (1987) (temporary takings differ only in degree, not in kind, from permanent takings and the duration goes to the *amount* of compensation required and not to the requirement itself). *See also United States v. Dow*, 357 U.S. 17, 26 (1958); *United States v. General Motors Corp.*, 323 U.S. 373 (1945).

[13] The Indiana Supreme Court held: "The extent of the intrusion here does not rise to the level of that in *Ziliak* where the State made an outright demand for access to the owner's land to conduct an archaeological dig by state-employed archaeologists. *Ziliak*, 428 N.E.2d 275. Here, the State is not seeking to physically occupy the land nor requiring any conveyance, it is only attempting to preserve the information at Beehunter until any qualified

(footnote continued)

Nollan establishes that the conditional nature of such a scheme, by which HUMER can avoid the condition (the archaeologic dig with State approved archaeologists and State inspection rights), by continuing the *status quo* use of the land, does not protect the condition against the Takings Clause. Yet, the Indiana court expressly based its holding on HUMER's ability to avoid the condition and continue to farm the land. Such is directly contrary to *Nollan*.[14]

HUMER has no more "choice" than did the Nollans. HUMER can forgo use of the Beehunter Site for surface mining and avoid the archaeologic exploration and excavation, just as the Nollans could have avoided granting the easement by not tearing down their old vacation house and building a new,

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Footnote 13 continued

archaeologists can recover it. As noted above, the intrusion here is minimal from an economic standpoint and amounts to *mere regulation*." [App. A10-A11 (emphasis added)]. To the extent that the Indiana court meant that "nothing is required" of HUMER in the sense that the mitigation plan is directed only to *any* owner of Beehunter and not HUMER *specifically*, this is a distinction without any basis. HUMER is the present owner of the land and it is clear — though ignored by the Indiana court — that HUMER's coal cannot be surface mined by HUMER or anyone else unless HUMER allows entry, ingress and egress, excavation and damage to the real estate as well as arranging for or directly financing the archaeologists. Indeed, this case highlights the unilateral character of the government's "claim of entitlement." *Cf. Nollan*, 483 U.S. at 833 n.2. Even the Indiana court, in its more candid moments, recognizes that the Director's mitigation plan "requires" HUMER to refrain from surface mining coal in a small portion of its property "*until important cultural information can be recovered.*" [App. at A13 (emphasis added)].

[14]The holding of the Indiana Supreme Court also violates *Loretto*, where, in support of the government enforced occupation of premises by cable television operators, it was asserted that the property owners were "not required" to submit to the State's sponsored physical occupation by the operator since the invasion was "use-dependent" and occurred only to the extent that the property owner chose to use the property as residential rental units. This Court rejected the argument, noting that a "landowner's ability to rent his property may not be conditioned upon his forfeiting the right to compensation for a physical occupation." [458 U.S. at 439, n. 17, as cited in *Nollan*, 483 U.S. at 837.]

permanent residence. However, to the extent that HUMER modifies the *status quo* by surface mining its coal (as the Nollans wished to do by building a new house), it is required to execute the Director's mitigation plan with the attendant uncompensated physical invasion of its property by the archaeologists, the excavation and destruction of the Site, permanent damage to the land, appropriation of artifacts, arrangement for or direct payment of $50,000 for archaeologic services with an analytic report which must be released to the public.

By viewing the condition to the removal of the land use restriction as "requiring nothing" from HUMER, the Indiana court was free to ignore the price for HUMER's being "free to continue the present use of farming," as well as being free to ignore the exaction the State required for surface coal mining. The Indiana Supreme Court never confronted the implications of such a condition on the nature of the public purpose either of the land use restriction *or* of the condition. Once the condition is properly viewed as a conditional *per se* take, the State's unspoken purpose — to acquire cultural and historic knowledge but without compensation to HUMER — becomes very real, indeed, to the point of absolute certainty. The State most clearly and succinctly "articulates" this purpose by its denial of HUMER's mitigation plan.[15]

C. Indiana Supreme Court Rejects Nollan's Heightened Scrutiny to Conditioning Removal of Land Use Restriction on Consent to an Otherwise Per Se Take.

Again contrary to *Nollan*, in reviewing whether the statute and DNR order substantially advanced a legitimate state inter-

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[15] The Director rejected HUMER's own proffered mitigation plan. [App. A52 - A56]. The only material difference between the Directors' mitigation plan and that submitted by HUMER is that the latter specifically provides that HUMER shall not be required to defray the cost (approximately $50,000) of the archaeologic research (and any damages resulting therefrom) resulting eventually in the publication of a written report memorializing the desired archaeologic "knowledge" and that the State must pay for damage to

(footnote continued)

est, the Indiana court applied but a rational basis level of scrutiny. The Indiana court held that *Nollan* "did not adopt any particular level of scrutiny to be applied across the board to all takings inquiries . . ." and, alternatively, that whatever level of scrutiny *Nollan* did require, "clearly extends only to . . . where . . . an actual conveyance of property [is] a condition to removal of a land use restriction." [App. A10].[16]

While *Nollan* recognized that this Court had not "elaborated on the standards for determining" a legitimate State interest or the "type of connection" needed to satisfy the nexus requirement that the land use restriction and the condition "substantially advance" a legitimate State interest, it clearly held that "these standards" are "*not* that the State 'could rationally have decided' the measure adopted might achieve the State's objec-

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Footnote 15 continued

HUMER's land. The Director's rejection of this plan, by which HUMER would voluntarily have opened its property to the archaeologists, provided only that they obtain their own funding, belies the state's intent as being restricted to mere acquisition of archaeologic "knowledge" and "information." Rather, the rejection of the HUMER plan demonstrates the state's intent to be that not only must the land owner allow free use and invasion of his premises, and appropriation of real and personal property, but that HUMER, and not the state, be required to pay the archaeologists for the privilege of permitting this intrusion.

[16] While rejecting the applicability of *Nollan's* required heightened scrutiny to the case at bar, the Indiana court engages in a "word game," implying that the level of scrutiny required by Indiana case law is the same as that required in *Nollan*. The Indiana court equated the "substantial relation" standard, enunciated in its previous opinion in *Young v. City of Franklin*, 494 N.E.2d 316 (Ind. 1986), with the "substantial advancement" standard in *Nollan*. [App. A9] . Of course, if the latter is true, then why would the Indiana court explicitly reject *Nollan's* heightened scrutiny as applicable to the case at bar? The answer is that the Indiana court simply did not realize that there is more to this issue than the pure linguistic meaning of the terms used. The real issue is whether more than a rational basis level of judicial review is required. The origins of *Young*, *supra*, at 318, reveal that the Indiana language is indicative of nothing more than a rational basis level of judicial review. *See*, as cited in *Young*, *supra*, *Chico Corp. v. Delaware-Muncie Board of Zoning Appeals*, 466 N.E.2d 472 (Ind. App. 1984).

tive." [483 U.S. at 833-34 and n. 3 (emphasis added)].[17] While this Court left open the issue whether the standards would be those applicable to suspect classes under equal protection analysis or the regulation of speech, the rational basis level of scrutiny was expressly rejected.[18]

There is no basis either in fact, law or logic for limiting the heightened scrutiny required by *Nollan* solely to situations where a condition to the removal of a land use restriction requires an actual conveyance of property. It makes no sense to apply a heightened standard of scrutiny to one category of physical intrusions or *per se* takes but not to other types of *per*

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[17] Where a condition to removal of a land use restriction requires "consent" to a *per se* take, *Nollan* requires a three-tiered analysis to determine the takings issue under some level of scrutiny beyond a rational basis. As to the land use regulation, first the nature of the asserted government purpose must be examined to determine if the "end" is a legitimate State interest. Second, the means/end nexus analysis must be made. In *Nollan*, the Court did not reach this first tier of the analysis since the Court assumed "without deciding" that the asserted purpose of the land use regulation was a permissible purpose, 483 U.S. at 835-36 ("so long as the Commissioner could have exercised its police power (as we have assumed it could)...)" [483 U.S. at 836]. Then, the same analysis must be made as to the condition for the removal of the land use regulation. Finally, an analysis must be made of whether the State interest advanced by the condition is the "same" as the State interest advanced by the land use regulation. Obviously, if the same analysis, at the same level of scrutiny, is not applicable to both the land use regulation and the condition, a State could involve an illegitimate interest in the land use regulation as acquisition of property but without compensation so that the analysis with respect to the State interest and nexus for the condition would be a foregone conclusion.

[18] Application of a heightened standard of scrutiny to the means-end nexus in the case of state sponsored physical appropriation, but not to the asserted state interest itself, would be contrary not only to the dictates of logic but also to this Court's use of heightened scrutiny standards in other constitutional contexts. *See Palmore v. Sidoti*, 466 U.S. 429 (1984) (requiring, in a suspect class case, a "compelling" state interest advanced by "necessary" means). Indeed, in *Penn Central v. New York*, 438 U.S. 104, 127 (1978), the Court required that the state's asserted interest be "substantial" in the takings and land use context.

se takes involved in a condition to the removal of a land use restriction.

The Indiana court's rejection of *Nollan's* required heightened scrutiny beyond the rational basis test is pervasive and leads to the Indiana court's widening *Nollan's* required nexus of the condition and the land use restriction, as well as to inconsistent statements concerning their ends, means and nexus.

D. Indiana Court Widens and Loosens Nollan's "Same Ends" Nexus Requirement

In apparent recognition of the weak basis on which it restricted *Nollan's* applicability, the Indiana court then as an alternate basis for its holding attempts [App. A11] to fit the DNR Order within the narrow confines of *Nollan's* statement that a State might require "a concession of property rights" as a condition to the removal of a land use restriction if the condition "serves the same end" or "serves the same governmental purpose" as the land use restriction [483 U.S. at 436 - 437]. However, even as it attempts to create harmony with *Nollan*, the Indiana court, again directly contradicts *Nollan* by expanding the narrow confines of *Nollan's* statement concerning a concession of property rights to be exacted from a landowner pursuant to a condition-based land use scheme. The Indiana court expands and loosens *Nollan's* nexus requirement of the "same" ends, to — a concession is permissible where the condition is only "consistent with [the] legitimate government interest" advanced by the land use restriction. [App. A11].

Effect — Rejection of "Same Ends". Having changed the *Nollan* requirement that the government purpose/end for the land use restriction and for the condition be "the same," the Indiana court avoids comparing the government purpose of the condition (acquisition of historic knowledge) with one of its

several but differing statements[19] of the purpose of the land use restriction ("preservation of *areas* culturally significant to our heritage") [App. A11, emphasis added]. Obviously, the condition's purpose is not "preservation of areas."

The government purpose of the condition is different, indeed, significantly different, from "preservation" of the Beehunter Site. By the Mitigation Plan, the Beehunter Site will not be preserved, but rather excavated with a total upheaval of the land far below the plow line throughout the six acres leaving the area without archaeologic value through acquisition of the historic knowledge. This is not preservation. This is acquisition of knowledge.

Of course, under *Nollan* this difference between the ends implicates that the purpose of the land use restriction is not preservation, but acquisition of knowledge without compensation. The State's purpose of avoiding the compensation requirement is further highlighted by its rejection of HUMER's mitigation plan.[20]

Effect — Rejection of Heightened Scrutiny. The loosening and widening of *Nollan's* "same ends" nexus requirement avoids the same result which the Indiana court avoids by

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[19] One may look in vain throughout the opinion of the Indiana court for a consistent articulation of the government "end" served by the restriction and by the condition. Initially, the Court posits the State's interest as: "[p]rotecting our national and State heritage *through* the preservation of archaeological sites. .. The general welfare of the public is greatly enhanced by such [historic and pre-historic] knowledge." [App. A8, emphasis added]. At other points of its opinion, however, the Indiana court variously sets forth the State's purpose/end as being: "preservation [of] important historic, cultural and natural aspects of our national heritage..." [App. A8]; "protecting cultural resources" until "the information in the site is scientifically recovered." [App. A9] ; "preservation" "*until* any qualified archaeologists can recover [the information at Beehunter]." [App. A11, emphasis added]; "preservation" of areas "culturally significant to our heritage" [App. A11]; and prevention of surface mining "*until* important cultural information can be recovered."] [App. A12, emphasis added].

[20] *See supra* note 15.

rejecting *Nollan's* required judicial scrutiny beyond a rational basis (i.e. uncompensated acquisition of knowledge) for reviewing the ends, means and nexus for both the land use restriction *and* the condition. Even when the Indiana court examined the State interest being advanced by application of the statute to an archaeologic site, it all but concluded that acquisition of "such knowledge" was the government purpose for the land use restriction. The Indiana Supreme Court articulated the purpose of the land use regulation applied to the archaeologic site as being the enhancement of the "general welfare" by the historic and pre-historic "knowledge" (gainable not through mere preservation of the Beehunter Site, but through acquisition, use, excavation, indeed destruction of the Site). [App. A8].

This statement of the public purpose is wholly proper, indeed unassailable. What the Indiana court failed to articulate in arriving at this conclusion due to its concomitant failure to exercise *Nollan's* required level of judicial scrutiny, was the uncontested fact that a raw, inaccessible archaeologic site which has not been scientifically recovered, presents but the opportunity for "knowledge" of history and that "such knowledge" comes into existence only through an archaeologic excavation, dig and "scientific" study. Implicit is the obvious conclusion that preservation is the means to the end of acquiring knowledge.[21]

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[21] The facts concerning the nature of the State interest as to a raw, unrecovered, inaccessible archaeologic site lying below the plow zone do not appear on the face of the statute. Presumably, the necessary background and facts can be demonstrated by the application of the statute and order, just as a similar inquiry must be made in assessing the "true nature" of a statute juxtaposed with an asserted or stated purpose. *Keystone Coal Association*, 480 U.S. at 487 n. 16 ("Pennsylvania Coal instructs courts to examine the operative provisions of a statute, not just its stated purpose, in assessing its true nature.") In the area of equal protection, and suspect classification, this Court recognizes "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger v. Wiesenfeld*, 420

(footnote continued)

Pure preservation for an undeveloped archaeologic site as an end simply cannot withstand a level of judicial scrutiny beyond a rational basis. Pure preservation is belied not only by the uncontested facts but by the mere presence of the condition and mitigation plan in the DNR Order, which are contrary to and which reject pure preservation as an end.

While the Indiana court all but stated preservation as a means to acquiring knowledge in articulating the purpose of the land use regulation, it quite clearly recognized the necessity for acquisition where it held the State "is only attempting to preserve the information at Beehunter *until* any qualified [state approved] archaeologist can *recover* it [of course, subject to State inspection]," [App. A11, A47, A50, emphasis added] or as it also recognized earlier, "the Mitigation Plan . . . allows a means for removal of the designation *once* the information in the site is *scientifically recovered.*" [App. A9, A11, emphasis added]. Here, again the Indiana court clearly and properly states "preservation" "until," is a means, not an end.

When the Indiana court attempted to fit within *Nollan*, the "end" (knowledge) had somehow changed to "pure" preservation. This was accomplished only by converting "preservation" from a means to an "end."[22] Again, preservation of a raw

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Footnote 21 continued

U.S. 636, 648 (1975). Of course, as this Court recognized in *Nollan*, the inquiry is not limited to a rational basis analysis. *See Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (noting that "legitimacy" in a state's interest in a particular statute was not sufficient in face of a suspect classification and that "this departure from 'traditional' rational-basis analysis with respect to sex-based classifications is clearly justified").

[22] The State and the Archaeologists probably led the Indiana court into misstating the concept of "preservation" as being an end, contrary to it being at best a means, through a desire to seek shelter within *Penn Central v. New York*, 438 U.S. 104 (1978). *Penn Central* is relied upon as support for the proposition that the State has a "legitimate State interest" in "preservation" of historic and cultural resources, but it is not controlling in the case at bar. New York's statutory scheme applied only to buildings, the mere existence of

(footnote continued)

archaeologic site, as an "end," makes no sense whatsoever, much less does it withstand *Nollan's* heightened scrutiny. Moreover, even accepting the Indiana court's statement of "pure preservation" as an end for the land use restriction, such "end" is not the same as the end for the condition. Hence, *Nollan's* required nexus of the same ends for both the condition and the land use restriction cannot be met,[23] giving rise to the inference that the purpose is acquisition of property but without compensation.

E. Indiana Court Avoids Critical Issues — Whether the Public Purpose is an Illegitimate State Interest — Confuses A Proper Governmental Purpose As Being Legitimate State Interest.

Even aside from, or maybe because of, these direct conflicts with *Nollan*, the Indiana court's takings analysis is fundamen-

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Footnote 22 continued

which was the public purpose which required no physical intrusion or actual use as in the case at bar with the raw "unrecovered" archaeologic site. The preservation goal in *Penn Central* was a pure preservation goal and *not* the means to another end as in the case at bar where preservation of a raw unrecovered archaeologic site is but preservation until acquisition since the goal of historic knowledge to enhance the general welfare is not possible without physical intrusion, entry, use, and indeed destruction of the Site by scientific "recovery." Finally, appellants in *Penn Central* never contested the legitimacy of the state interest presented by the New York statutory scheme.

[23] The Indiana Court's loose and inconsistent approach to defining precisely the end sought to be accomplished by the restriction and by the condition stands in sharp contrast to this Court's careful parsing of the State's asserted end in *Nollan*, (*i.e.*, visual and psychological "access" to the California coastline). In applying a heightened level of scrutiny to the asserted end, and in requiring that the "same end" be advanced by both the asserted purpose for the restriction and the condition thereto, this Court found where the restriction was to alleviate a burden on vertical access to the coast from the street in front of the Nollan's property, and the required condition (a lateral access easement) served only to improve the public's lateral access across the beach, the "same" ends were not served. Hence, the State's condition-based scheme was nothing more than an "out and out plan of extortion" inconsistent with the Fifth Amendment. [483 U.S. at 837-38].

tally flawed in other respects. The Indiana court never addressed what *Nollan* establishes as the critical inquiry with respect to the statute and DNR order as applied to the HUMER property — whether the public purpose in fact extends *sotto voce* to acquisition and use of property for a proper public use but to avoid the compensation requirement — which, pursuant to *Nollan*, is not a "legitimate State interest" in the takings and land use context. *Nollan*, 483 U.S. at 837.

No doubt, the Indiana court's erroneous view that the conditional nature of the required archaeologic dig itself sufficed to prevent a taking, and its judicial review being limited to a rational basis test, blinded the Indiana court to the required inquiry. However, an even more fundamental contravention of this Court's precedents is involved. The Indiana court, as a conceptual matter, equated a "legitimate state interest" with a valid public purpose or use. *Nollan* of course is to the contrary.

No where on the face of the Indiana court's opinion is the difference noted. Further, in discussing what is a "legitimate State interest," the Indiana court appears to equate such with the full extent of the State's police power.[24] Then, the Indiana

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[24] The Indiana court held in this regard: "There is no set rule to apply in making the determination of what constitutes a legitimate state interest but it is generally accepted that government has the power to enact laws and regulations to promote order, safety, health, morals and the general welfare of our society [i.e. the State's police power]. The decisions of this Court and the Courts of Appeals have not dwelled on this aspect of the takings inquiry. However those decisions implicity make clear that a broad range of government interests satisfy the legitimacy requirement. *Young*, 494 N.E.2d 316 (upholding refusal to rezone land to residential class); *Alanel Corp. v. Indianapolis Redevelopment Commission* (1958), 239 Ind. 35, 154 N.E.2d 515 (upholding redevelopment acts dealing with acquisition of blighted urban areas) . . . " [App. A8]. To be noted is the Indiana court's equating a "legitimate State interest" with the scope of the police power. The court's confusion is further highlighted by its citation to *Ziliak*, *supra*, another condemnation case, for the proposition that "preservation of archaeologic sites" is a "legitimate state interest" within the meaning of *Nollan*. [App. A8].

court states that among the cases which "implicitly make[s] clear that a broad range of governmental interests satisfy the *[Nollan]* legitimacy requirement" is *Alanel Corp. v. Indianapolis Redevelopment Commission*, 154 N.E.2d 515 (1958). *Alanel* is a case similar to *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), which did not involve a question of a "legitimate State interest" in an alleged taking without compensation context, but rather the question of the sufficiency of public use to justify an exercise of the takings power by eminent domain, *with compensation*.

While no doubt the "public use" requirement is coterminous with the scope of a State's police power-public purpose, *Keystone*, *supra*, in a Fifth Amendment unlawful takings without compensation context, finding a proper public purpose/use is but the beginning of the analysis. Legitimate state interests are not coterminous with the scope of police power-public purpose requirements. *Nollan*, 483 U.S. at 837. Even in a pure land use regulatory context, "the nature of the government purpose in the regulation is a critical factor in determining whether a taking has occurred, and thus whether compensation is required." *Keystone Coal Association*, 480 U.S. at 488.[25]

If the nature of the public purpose is "critical" in a pure land use regulation situation, then in the case at bar, where the State requires in a condition to the removal of a land use regulation accession to an otherwise *per se* take, the nature of the public purpose must be something more "critical" still. Indeed, in the analysis of whether there is a legitimate State interest, *Nollan* requires recognition that where accession to an otherwise *per se* take is made a condition to the lifting of a land use restriction, "there is heightened risk that the [unstated] purpose is avoidance of the compensation requirement

[25] "Thus, the Court made clear that the mere existence of a public purpose was insufficient to release the government from the compensation requirement . . . " *Keystone Coal Association*, 480 U.S. at 510 (Rehnquist, C. J., dissenting).

. . ." [483 U.S. at 841]. Where this is so, the scheme is not within the outer limits of "legitimate state interests" even though the acquisition may serve a valid public purpose or use.

In summary, the Indiana court failed to differentiate a valid public purpose to support an exercise of the police power from a legitimate State interest in the takings and land use context. Therefore, finding a public use/purpose, the Indiana court ended its inquiry and never confronted the issue of whether the land use restriction and the condition for its removal through the application of the statute and the DNR order to the HUMER property had a purpose of acquiring property, for a valid public use, but without compensation, which is not within the "outer limits of legitimate state interests." *Nollan*, 483 U.S. at 837.

III. Conclusion

Certiorari should be granted to eliminate the Indiana court's conflicts with *Nollan* under SMCRA, a pervasive national statutory scheme. Indiana's tacit purpose of avoiding the compensation requirement for acquisition of historic knowledge is underscored by its denial of HUMER's mitigation plan. The necessity of public funding could not be more apparent. Allowing the judgment below to stand would indeed reduce the Fifth Amendment to "a pleading requirement," which *Nollan* prohibits, and allow *de facto* condemnation without compensation.

Respectfully submitted,

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Appendix

APPENDIX

IN THE
SUPREME COURT OF INDIANA

DEPARTMENT OF NATURAL RESOURCES AND WABASH VALLEY ARCHAEOLOGICAL SOCIETY, INC. and COUNCIL FOR THE CONSERVATION OF INDIANA ARCHAEOLOGY, INC.,	)	
Appellants,	)	NO. 19S00-8802-CV-263 Filed August 31, 1989
V.	)	
INDIANA COAL COUNCIL, INC. and HUNTINGBURG MACHINERY & EQUIPMENT RENTAL, INC.	)	
Appellees.	)	

APPEAL FROM THE DUBOIS CIRCUIT COURT
CAUSE NO. C-86-15
The Honorable Hugo C. Songer, Judge

DeBRULER, J.

This is an appeal from the Dubois Circuit Court and the determination there that certain provisions of Indiana's version of the Surface Mining Control and Reclamation Act ("SMCRA"), I.C. 13-4.1-1-1, et seq., and regulations promulgated thereunder, 310 I.A.C. 12-2-1, et seq., as applied by the Indiana Department of Natural Resources to land owned by Huntingburg Machinery & Equipment Rental, Inc.

("HUMER") amounted to an unconstitutional taking under the Fifth Amendment to the Constitution of the United States. Under Appellate Rule 4(A)(8), this Court has exclusive jurisdiction to hear cases in which a statute has been declared unconstitutional; and because of the important constitutional issues involved, transfer is granted.

The land at issue, owned by HUMER, is currently being farmed but sits atop three seams containing approximately 1.537 million tons of mineable coal. In a small, 6.57 acre portion of the land, sitting on top of approximately 55,200 tons of coal, lies what has become known as the Beehunter Site, an archaeologically significant area, rich in cultural deposits with substantial historic and scientific value. The Beehunter Site's importance stems from the fact that below the plow zone it contains a substantially intact "midden," with artifacts from four distinct cultural periods of occupation, which would allow anthropologists to make cross-cultural comparisons of different adaptations to the same environmental niche. The site was nominated and found eligible for listing on the National Register of Historic Places. 51 Fed. Reg. 6677 (1986).

The Wabash Valley Archaeological Society, Inc. ("Wabash Valley") petitioned the Department of Natural Resources ("DNR") to have the site designated as an area unsuitable for surface coal mining under I.C. 13-4.1-14-2. The director of DNR may declare an area unsuitable for surface coal mining if the coal mining operation will "affect fragile and historic lands in which the operation could result in significant damage to important historic, cultural, scientific, and esthetic values and natural systems. . . ." I.C. 13-4.1-14-4. A public hearing was held and on November 19, 1985, pursuant to this provision and Wabash Valley's petition, the director made an initial determination that Beehunter was an area unsuitable for surface coal mining. By this time the Indiana Coal Council ("Coal Council") and the Council for the Conservation of Indiana Archaeology ("CCIA") had entered the proceedings. The Coal Council and HUMER filed timely objections and a hearing was

held on December 19, 1985, pursuant to I.C. 4-22-1-12 (repealed 1986). A final order was issued by the director of the DNR on January 3, 1986 designating the Beehunter Site unsuitable for surface coal mining.

As part of his final order, the director included a mitigation plan which provided a means by which the designation of "area unsuitable" could be removed. It calls for a program of site testing and data recovery conducted by an archaeological contractor approved by DNR. The plan does not require HUMER to carry out the plan, to expend any money, or to convey any property or property right to the State. It affects no existing contractual rights. In fact, the designation does not prevent HUMER from continuing to farm the land, nor from mining virtually all of the coal under its farmland, so long as the coal that lies underneath the 6.57 acre Beehunter Site is extracted by means other than strip mining, a process which would destroy the archaeological information contained in the site. For these reasons, and those delineated below, we hold that the director's order, designating the Beehunter Site as an area unsuitable for surface coal mining and providing a mitigation plan by which the designation may be removed, does not amount to an unconstitutional taking of property.

The Fifth Amendment provides that "[no] private property [shall] be taken for public use, without just compensation," and, of course, applies to the states through the Fourteenth Amendment. This seemingly simple mandate has become increasingly difficult to apply as the complexities of modern life have necessitated a wide variety of land use regulations. More than sixty years ago, Justice Holmes recognized that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322, 325 (1922), but also noted that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking," *id.*, 260 U.S. at 415, 43 S.Ct. at 160, 67 L.Ed. at 326.

The difficulty has been in devising rules that establish a line between regulation that is permissible and that which "goes too far." Consequently, the determination often rests on "ad hoc factual inquiries" involving the facts and circumstances of each particular case. *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 508, 107 S.Ct. 1232, 1254, 94 L.Ed.2d 472, 503 (1987) (Rehnquist, C.J., dissenting), *citing Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631, 648 (1978).

However, we are not without guidance in this area. Recent United States Supreme Court cases have provided a two-prong test as an aid in making the determination. Under this rule, when applied to a particular piece of property, a land use regulation will not effect a taking if it substantially advances a legitimate state interest and does not deprive an owner of economically viable use of his property. *Nollan v. California Coastal Commission*, 483 U.S. 825, 834, 107 S.Ct. 3141, 3146, 97 L.Ed.2d 677, 687 (1987). Until recently, the inquiry generally focused on the second of the two prongs, attempting to determine the economic impact of the regulation on the land. *See Keystone*, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed. 472; *Penn Central*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631. In *Nollan*, however, the Court emphasized the first prong in striking down a condition placed upon the granting of a zoning variance, finding that the condition did not substantially advance the interests sought to be achieved by the regulation. The two prongs are indicative of the various guises that a constitutional attack on a land use regulation may take.

The essence of the first prong of the test is whether government had the right to exercise its police power in the manner it did, regardless of the burden to the property. Or, in other words, it asks the question: has government regulated where it should not have done so? If the regulation does not bear a substantial relation to the legitimate ends sought to be achieved, either through a failure of the statute as a whole to serve those ends or as applied to a particular piece of property,

then the exercise of the police power is deemed to be unreasonable. A variation of this type of challenge would exist where the ends themselves were not legitimate. The state could not, for example, regulate property simply because it does not agree with the religious or political views of the land owner. *See Williamson Co. Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 202 n.1, 105 S.Ct. 3108, 3125 n.1, 87 L.Ed.2d 126, 149 n.1 (1985) (Stevens, J., concurring).

The economic inquiry of the second prong of the test has its roots in Justice Holmes's decision in *Pennsylvania Coal*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322, which is generally regarded as the seed from which all modern regulatory taking cases have grown. In that case, a Pennsylvania statute requiring that a certain amount of coal be left unmined so as to prevent subsidence to the surface estate was struck down as unconstitutional because it interfered with the distinct investment-backed expectations of the owners of the mineral estate and did not provide compensation for the coal that was "taken." This consideration for distinct investment-backed expectations remains essential today. *Penn Central*, 438 U.S. 121, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631, 648; *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 100 S.Ct. 383, 390, 62 L.Ed.2d 332, 343 (1979). It is also necessary to examine the economic impact of the regulation on the claimant in terms of the diminution in value of the land, *id.*, and the extent of any interference with the present use of the land, *Penn Central*, 438 U.S. at 136, 98 S.Ct. at 2665, 57 L.Ed.2d at 656. In determining the degree of diminution in value, the particular segment that is affected is not considered alone, but the claimant's property as a whole is compared to that portion which is encumbered. *Keystone*, 480 U.S. at 497, 107 S.Ct. at 1248, 94 L.Ed.2d at 496. Of course, the nature and character of the interference is also relevant; and where a regulation results in permanent physical occupation of property, a taking will almost invariably be found. *Id.*, 480 U.S. at 488-489 n.18, 107 S.Ct. at 1244 n.18, 94 L.Ed.2d at 490 n.18; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).

All of the economic inquiries deal with the degree to which a property has been encumbered by a regulation. In that sense, the essence of the second prong of the test is whether government has regulated to a greater extent than it should have so that a land owner has been effectively deprived of productive use of his property.

We turn now to the claims of HUMER and the Coal Council that the director's order here declaring the Beehunter Site as an area unsuitable for surface mining of coal is an unconstitutional taking. We note at the outset that HUMER and the Coal Council have challenged the director's order as invalid under the Fifth Amendment and that the burden on a party attempting to show that a regulatory taking has occurred is a heavy one. *See Keystone*, 480 U.S. at 499, 107 S.Ct. at 1246, 94 L.Ed.2d at 497. Turning to the second prong of the analysis, it is clear that the economic impact on HUMER here is comparatively slight and no showing to the contrary was made in any of the proceedings below. The record indicates that HUMER or its predecessors have held the land upon which the Beehunter Site is located since the mid-1940s. It has been farmed since that time and there is no indication that it was acquired with the intent to mine coal. In fact, the seams of coal were apparently discovered rather recently. It cannot be said, therefore, that the designation of Beehunter has interfered with HUMER's distinct and reasonable investment-backed expectations since there was no expectation of coal mining at the time investment in the property was made. Furthermore, the designation obviously does not interfere with HUMER's present use of the property. It has been farming the land and presumably will continue to do so.

More importantly, the overall effect on the value of the land is minute here. The Beehunter Site represents approximately 6.57 acres of a 305 acre farm, or just slightly over two percent of the whole. In terms of mineable coal, the designation affects only 6.5 percent of the total coal resources on the land and, if alternative methods of mining were used, such as auguring,

that figure could be reduced to less than three percent. This Court has previously upheld much more "intrusive" restrictions upon land in the context of zoning. In *Young v. City of Franklin* (1986), Ind., 494 N.E.2d 316, it was noted that a land owner is not entitled to the highest and best use of his land and a taking results under the economic impact inquiry only when all reasonable use of the land is prevented by the land use regulation. *Id.* at 318, *citing City of Anderson v. Associated Furniture & Appliances, Inc.* (1981), Ind., 423 N.E.2d 293; *Foreman v. State ex rel. Department of Natural Resources* (1979), 180 Ind.App. 94, 387 N.E.2d 455. This position is in harmony with decisions of other courts that have sustained land use regulations despite their having the effect of severely reducing or holding down the land value from that of its desired use. *Penn Central*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed. 631; *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *Pompa Construction Corp. v. Saratoga Springs*, 706 F.2d 418 (2d Cir. 1983); *Rogin v. Bensalem Township*, 616 F.2d 680 (3d Cir. 1980), *cert. denied sub nom. Mark-Garner Associates, Inc. v. Bensalem Township*, 450 U.S. 1029, 101 S.Ct. 1737, 68 L.Ed.2d 223 (1981); *William C. Haas & Co. v. City and County of San Francisco*, 605 F.2d 1117 (9th Cir. 1979), *cert. denied*, 445 U.S. 928, 100 S.Ct. 1315, 63 L.Ed.2d 761 (1980).

Thus, because HUMER's investment-backed expectations and present use of the land have not been interfered with and because there has been no significant diminution of the land's value, it is clear that from an economic standpoint, the extent of government's intrusion into HUMER's property is comparatively small and, in and of itself, does not rise to the level of a taking of property. However, HUMER and the Coal Council rely, for the most part, on the first prong of the takings inquiry in their attack on the constitutionality of the designation, arguing the director's order and accompanying mitigation plan do not substantially advance legitimate state interests. In so doing, they challenge the constitutionality of the statute and

regulation not as a whole, but as applied to HUMER's property.

There is no set rule to apply in making the determination of what constitutes a legitimate state interest but it is generally accepted that government has the power to enact laws and regulations to promote order, safety, health, morals and the general welfare of society. The decisions of this Court and the Courts of Appeals have not dwelled on this aspect of the takings inquiry. However those decisions implicitly make clear that a broad range of government interests satisfy the legitimacy requirement. *Young*, 494 N.E.2d 316 (upholding refusal to rezone land to residential class); *Alanel Corp. v. Indianapolis Redevelopment Commission* (1958), 239 Ind. 35, 154 N.E.2d 515 (upholding redevelopment acts dealing with acquisition of blighted urban areas), *Foreman*, 180 Ind.App. 94, 387 N.E.2d 455 (upholding flood control act). Federal decisions have reached similar conclusions. *Agins v. Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980) (scenic zoning); *Penn Central*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (landmark preservation); *Barrick Realty, Inc. v. City of Gary*, 491 F.2d 161 (7th Cir. 1974) (maintaining stable integrated neighborhoods).

Protecting our national and state heritage through the preservation of archaeological sites must be included in this broad spectrum of legitimate interests of government. The information in these sites expands our knowledge of human history and prehistory and thus enriches us as a state, nation and as human beings. The general welfare of the public is greatly enhanced by such knowledge. We note that our Court of Appeals implicitly recognized this in *State Highway Commission v. Ziliak* (1981), Ind.App., 428 N.E.2d 275, declaring that highway construction projects must adhere to the Indiana Environmental Policy Act which requires that all practicable means be used to coordinate resources to "preserve important historic, cultural, and natural aspects of our national heritage. . . ." *Id.* at 281; I.C. 13-1-10-2. We recognize it explicitly here.

In examining the nexus between the land use regulation and the state interest, we have relied on the phrasing of earlier Supreme Court cases, and have required that there be a "substantial relationship" between the two. *Young*, 494 N.E.2d at 318; *see Ambler Realty*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 and *Nectow v. City of Cambridge*, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928). However, there is authority that suggests that a land use regulation need only be "reasonably related" to the legitimate state interests to be valid, *Penn Central*, 438 U.S. 104, 131, 98 S.Ct. 2646, 2662-63, 57 L.Ed.2d 631, 652; *Foreman*, 387 N.E.2d 455, 461, or that it be "reasonably necessary to the effectuation of a substantial public purpose," *Penn Central*, 438 U.S. at 127, 98 S.Ct. at 2660, 57 L.Ed.2d at 650, or that it "substantially advance" a legitimate state interest, *Agins*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106, 112. The Supreme Court has, as yet, been unable to settle on an exact standard for assessing the connection between the regulation and the state interest, *Nollan*, 483 U.S. at 834, 107 S.Ct. at 3147, 97 L.Ed.2d at 687-688, and we see no reason to depart from the standard as stated in *Young* that there be a "substantial relation" between the two. The basis for the inquiry is to assure that the state does not effect a collateral purpose or end under the guise of a legitimate purpose or end, regulating where it has no right to do so. Such assurance is obtained when the effect of the regulation is substantially consistent with the legitimate ends of the state.

Here the legitimate ends of protecting cultural resources from the threat of strip mining are served by both the designation of the Beehunter Site as an area unsuitable for surface mining of coal and by the mitigation plan which allows a means for removal of the designation once the information in the site is scientifically recovered. The order is completely consistent with legitimate state ends.

Be that as it may, HUMER and the Coal Council direct this Court's attention to *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677, and argue

that case has imposed an entirely new analytical framework on takings inquiries where the state places a condition on the removal of a land use restriction. They maintain that, in such an instance, the condition must serve the same legitimate police power interest as the land use restriction to be valid and that where the condition requires a conveyance to the state or would otherwise amount to a taking, a heightened level of scrutiny should be employed in examining the state action.

The *Nollan* court relied on the rule from *Agins* that the regulation "substantially advance" a legitimate state interest and did hold that a condition to removal of a land use restriction must similarly advance that end. *Id.*, 483 U.S. at 834, 107 S.Ct. at 3146, 97 L.Ed.2d at 687. However, it did not adopt any particular level of scrutiny to be applied across the board to all takings inquiries:

> We are inclined to be particularly careful about the adjective ["substantial"] where the *actual conveyance of property* is made a condition of the lifting of a land use restriction, since in that context there is a heightened risk that the purpose is avoidance of the compensation requirement rather than the stated police power objective. [emphasis added]

Id., 483 U.S. at 841, 107 S.Ct. at 3150, 97 L.Ed.2d at 692. If this amounts to a heightened scrutiny, it clearly extends only to situations where government requires an actual conveyance of property as a condition to removal of a land use restriction. Furthermore, the stated test used by this Court, that there be a "substantial relation" between the regulation or the condition and the legitimate state interest, is essentially the same standard.

In their reliance on *Nollan*, HUMER and the Coal Council attempt to cast the director's inclusion of a mitigation plan with his order as amounting to a condition requiring an intrusion tantamount to an actual conveyance of property. The order and mitigation plan require nothing of the sort. HUMER is required to do nothing and it is free to continue the present use

of farming the land in question. The extent of the intrusion here does not rise to the level of that in *Ziliak* where the State made an outright demand for access to the owner's land to conduct an archaeological dig by state-employed archaeologists. *Ziliak*, 428 N.E.2d 275. Here, the State is not seeking to physically occupy the land nor requiring any conveyance, it is only attempting to preserve the information at Beehunter until any qualified archaeologist can recover it. As noted above, the intrusion here is minimal from an economic standpoint and amounts to mere regulation.

Furthermore, such conditions to the removal of land use restrictions are wholly within the perimeters of *Nollan*:

> [T]he Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, *even a concession of property rights*, that serves the same end. If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not. [emphasis added]

Nollan, 483 U.S. at 836, 107 S.Ct. at 3148, 97 L.Ed.2d at 689. We have already noted that the purpose of the alternative to the prohibition here, the mitigation plan, is consistent with the legitimate government interest served by the prohibition itself: preservation of areas culturally significant to our heritage. Even if we accept the appellees' characterization of DNR's mitigation plan as conditioning the removal of the area unsuitable designation upon HUMER's "conveying" archaeological information to the State for public use without compensation, it is clear that under *Nollan* such a condition would be a constitutionally valid exercise of the police power, since the removal of a restriction may be conditioned even on "a concession of property rights." *Id.* It would be not only strange, but against all reason to conclude that the State's prohibition of surface mining of the Beehunter Site was a legitimate exercise of the police

power but that providing HUMER with an alternative to the prohibition which, like the prohibition itself, also helped to preserve our cultural heritage was not a legitimate exercise of that power. *Id.*

HUMER and the Coal Council argue that the director's order and mitigation plan do not substantially advance the legitimate state interest of preservation of our cultural heritage because they protect Beehunter only against destruction from surface coal mining. They suggest that because the site could be destroyed by any number of other means that have not been protected against by the State, including malicious destruction by the owner, the government's legitimate interest is not substantially advanced by the designation alone. However, we do not read the cases delineating takings jurisprudence to require that a regulation be successful in accomplishing substantially all possible ends that further the legitimate state interest, only that it substantially achieve those ends the legislature, in furtherance of legitimate state interests, deems necessary to address. The nature of the political process dictates that "[l]egislatures may implement their program step by step . . . in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations." *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511, 517 (1976).

Here the state interest sought to be protected is our cultural heritage by prohibiting the destruction of cultural data from strip mining. That the legislature has not, as yet, chosen to address other threats to these archaeologically significant areas does not automatically transpose their action into a taking or an unconstitutional exercise of the State's police power. The regulations as applied to HUMER's property through the director's order and mitigation plan bear a substantial relation to the legitimate state interest of preserving our cultural heritage by protecting culturally significant data from strip mining. They are, thus, a legitimate exercise of the State's

police power and since the economic impact of the regulations is slight, they do not amount to an unconstitutional taking of HUMER's property.

Finally, HUMER and the Coal Council argue that the director's order was arbitrary and capricious and an abuse of discretion. The rule as to administrative actions has been well stated by our Court of Appeals, and we adopt it here, that an administrative act is arbitrary and capricious only where it is willful and unreasonable, without consideration and in disregard of the facts or circumstances in the case, or without some basis which would lead a reasonable and honest person to the same conclusion. *Metropolitan School District of Martinsville v. Mason* (1983), Ind.App., 451 N.E.2d 349. Moreover our decisions have stated that courts may not substitute their own judgment or opinion for that of the administrative body acting in discretionary matters within its jurisdiction. *Mann v. City of Terre Haute* (1960), 240 Ind. 245, 163 N.E.2d 577. HUMER and the Coal Council maintain that the director should have accepted a mitigation plan proposed by HUMER in place of the plan that was made a part of the order; and, by not doing so, the intent of the statute was not carried out because HUMER is forced to bear the cost of an archaeological dig and is given an incentive to destroy the site by other means. These issues have been addressed above. They look no better cloaked in a challenge based on arbitrariness, capriciousness or abuse of discretion than they do in a constitutional guise. The mitigation plan proposed by the director requires nothing of HUMER except to refrain from strip mining coal in a small portion of its property until important cultural information can be recovered. HUMER introduced no evidence at any of the administrative hearings that its plan was superior to that proposed by the director, or even that it was minimally adequate to accomplish that end. As to any incentive HUMER may have to maliciously destroy Beehunter, it is entirely plausible for the director to have concluded that the low regard in which any such action would be held by the DNR at subsequent hearings for removal of the "area unsuitable" designation was a sufficient deterrent to such unethical behavior.

In short, the director's order is entirely reasonable and there is a sufficient basis in the record which would lead a reasonable and honest man to the same conclusion. The director fulfilled his statutory obligation to prepare a detailed statement on the potential coal resources of the area, the demand for coal, and the impact of the designation on the economy, the environment and the coal supply. I.C. 13-4.1-14-3. The record shows that Wabash Valley and CCIA introduced expert witnesses whose testimony tended to support the director's decision and HUMER and the Coal Council produced no experts whatsoever. The order is neither arbitrary, capricious nor an abuse of discretion.

The request for oral argument is denied. The decision of the Dubois Circuit Court setting aside the order of the director of the Department of Natural Resources is vacated and the cause is remanded to that court to enter a decree denying relief from that order.

Shepard, C.J., Givan, Pivarnik, Dickson JJ., concur.

STATE OF INDIANA)
) SS:
COUNTY OF DUBOIS)

IN THE DUBOIS CIRCUIT COURT

CAUSE NO. C-86-15

IN RE THE MATTER OF:

INDIANA COAL COUNCIL, INC. and HUNTINGBURG MACHINERY & EQUIPMENT RENTAL, INC.,

Claimants,

vs.

DEPARTMENT OF NATURAL RESOURCES

Respondent,

and

WABASH VALLEY ARCHAEOLOGICAL SOCIETY, INC. and COUNCIL FOR THE CONSERVATION OF INDIANA ARCHAEOLOGY, INC.

Respondents/Intervenors.

FINDINGS AND CONCLUSIONS

In this proceeding, claimants Huntingburg Machinery & Equipment Rental, Inc. ("Humer") and Indiana Coal Council, Inc. (the "Coal Council") seek judicial review of a final determination of the Director of the Indiana Department of Natural Resources (the "Director") designating certain land in Greene

County, Indiana, unsuitable for surface coal mining pursuant to Ind. Code §§ 13-4.1-14-1, *et seq.* Respondent/Intervenors Wabash Valley Archaeological Society, Inc., ("Wabash Valley") and the Council for the Conservation of Indiana Archaeology, Inc. ("CCIA") have appeared in support of the Director's decision.

Because this is a proceeding of judicial review under the Administrative Adjudication Act ("AAA"), Ind. Code §§ 4-22-1-1, *et seq.*, the case must be decided based on the administrative record before the Director and the briefs and arguments of the parties. The administrative record has been filed, all parties' briefs have been filed, and the Court heard oral argument for all parties on November 14, 1986. This case is now ready for decision, and the Court now makes the following findings of fact and conclusions of law pursuant to Ind. Code §§ 4-22-1-18(d). To the extent that any finding of fact is labeled a conclusion of law or *vice versa*, the substance of the finding or conclusion shall control:

FINDINGS OF FACT

A. Procedural Background

1. The Land at issue in this proceeding is an archaeological site known as the "Beehunter Site" in Greene County. The Beehunter Site occupies an area of approximately 440 feet by 650 feet (6.57 acres) atop a broad bluffline spur that overlooks a former marsh area associated with Beehunter Ditch. Boundaries of the Beehunter Site have been determined by the density of archaeological materials observed during three informal surface surveys, with a scatter of archaeological materials over a larger area. The greatest density of cultural materials occurs within a more limited area of approximately 195 feet by 163 feet centered on the highest elevation, near the western boundary of the site. Respondent/Intervenors' Exhibits 1 and 3 locate the Beehunter Site more precisely.

2. On November 19, 1985, pursuant to a petition by Wabash Valley, the Director issued an initial determination that the Beehunter Site is a land unsuitable for surface coal mining, as provided in Ind. Code § 4-22-1-25, Ind. Code § 13-4.1.1-14 and 310 I.A.C. §§ 12-2-1 *et seq.*.

3. The Coal Council and Humer filed timely objections to the Director's initial determination and requested that a hearing be conducted pursuant to the AAA and 310 I.A.C. 0.5 prior to entry of a final order, thus initiating the AAA proceeding.

4. On December 10, 1985, leave for Wabash Valley and CCIA to intervene in the AAA proceeding was granted.

5. The Department of Natural Resources is an agency as defined in Ind. Code § 4-22-1-2. The Director was the ultimate authority of the Department of Natural Resources with respect to the administrative proceeding.

6. The Director had jurisdiction over the subject matter and parties to this action.

7. 310 I.A.C. § 12-2-9(c) requires the Director to issue a final written decision on a lands unsuitable petition within sixty (60) days of completion of the public hearing, and the public hearing was held and completed on November 4, 1985.

8. A hearing conducted pursuant to the AAA was held on December 19, 1985, before an administrative law judge appointed by the Director.

9. Prior to the AAA hearing, Humer had twice submitted proposals to the Director for measures to mitigate the adverse impacts of mining on the archaeological resources of the Beehunter Site ("mitigation plan"). (AC No. 84-291R, R 60, 334). Each proposal essentially offered to make the Beehunter Site available for investigation by interest archaeologists for a period of time prior to mining. There was no testimony at the AAA hearing as to the adequacy or inadequacy of Humer's proposals. The Department of Natural Resources staff archaeologist who had drafted a mitigation plan for the Director's

initial determination did not consider Humer's proposals because he did not have them available to him at the time he drafted his mitigation plan. (AC No. 85-261R, Tr. 131, 166). The Director's final decision contains a mitigation plan (AC No. 85-261, R. 12-18) which was modeled on standards applicable under the NHPA of 1966, but there is no evidence that the Director thought he was legally bound to follow those guidelines. It would require Humer to have the Beehunter Site investigated by professional archaeologists at Humer's or some other party's expense, and set forth detailed requirements for the examination of the site, data recovery, analysis, and publication, and curation of artifacts. The Director's mitigation plan was equivalent to what would be required of a governmental agency under the National Historic Preservation Act of 1966 (AC 85-261R, Tr. 125, 162). The cost to Humer or some other party of the Director's mitigation plan would have been approximately $50,000.00, if carried out. (AC No. 85-261R, Tr. 114, 136-141). The mitigation plan does not require the owners to take any affirmative action.

10. Prior to the AAA hearing, Humer and the Coal Council both moved that the hearing be delayed in order to allow more time for discovery, but the motion was denied in view of the statutory requirements that the Director issue a final decision within sixty (60) days of the original public hearing held on November 4, 1985. Humer and the Coal Council did not file any discovery requests or motions for expedited discovery, or otherwise identify the additional discovery they sought.

11. Prior to the November 4, 1985, public hearing, the Coal Council's request for a subpoena duces tecum to the Department was denied. The Department did provide the Coal Council with materials concerning the Beehunter Site. Those materials contained an extensive bibliography of materials discussing related archaeological sites, and the Department offered to make available any materials listed in the bibliography that were not readily available elsewhere. See Entry of October 15, 1985. In a later order, the hearing officer invited the

Coal Council to ask for reconsideration of its motion of the material provided was not adequate. Order of November 1, 1985. No request for reconsideration was made.

12. At the beginning of the November 4, 1985, public hearing, the hearing officer denied the Coal Council's request to prohibit Wabash Valley from participating in the hearing or introducing evidence based on its failure to respond promptly to interrogatories.

13. On January 3, 1986, the Director took final action and designated the Beehunter Site unsuitable for surface coal mining. Humer filed a timely petition for judicial review in this Court, and the Coal Council intervened in support of Humer.

B. The Parties

14. Wabash Valley is an Indiana not-for-profit corporation. It is an avocational organization which promotes archaeological study of Indiana's prehistory by, among other things, assisting professional archaeologists and educating the public regarding Indiana's prehistory. Wabash Valley filed the original petition seeking to have the Beehunter Site designated unsuitable for surface mining. Wabash Valley intervened in the AAA proceeding in support of the Director's initial determination.

15. The CCIA is an Indiana not-for-profit corporation which has intervened in support of Wabash Valley's petition and the Director's initial determination. The CCIA is an organization of professional Indiana archaeologists which promotes the preservation, conservation, and wise use of Indiana's archaeological resources.

16. The Coal Council is a trade association representing the Indiana coal industry.

17. Humer is a corporation owned by Max Olinger and his four brothers and sisters. Humer owns and farms land occupied by the Beehunter Site together with adjacent farmlands, which land was purchased in the 1940s by Mr. Olinger's

father. (AC No. 85-261R, Tr. 244). Humer is the owner of the Beehunter Site and adjacent farmland.

18. Members of Wabash Valley have made use of the archaeological resources of the Beehunter Site by visiting the site, surveying and collecting artifacts, studying, analyzing, and curating those artifacts, studying the professional survey records of the site, and nominating the site for listing on the National Register of Historic Places. Wabash Valley members are also engaged in fieldwork and research on the several prehistoric cultures which appear to have occupied the Beehunter Site. The foregoing activity has been within the scope of Wabash Valley's purposes.

19. Members of CCIA have made use of the archaeological resources of the Beehunter Site by visiting the site, surveying and collecting artifacts, studying, analyzing, and curating those artifacts, studying the professional survey records of the site, and nominating the site for listing on the National Register of Historic Places. In addition, CCIA members are engaged in professional research on related archaeological sites and the several prehistoric cultures which appear to have occupied the Beehunter Site. The foregoing activity has been within the scope of CCIA's purposes.

C. The Beehunter Site

20. Three limited but professional archaeological surface surveys of the Beehunter Site have revealed dense distributions of numerous archaeological artifacts including flint blades, flint chips, chert chips, and numerous pottery fragments.

21. Among the Beehunter Site artifacts are several "diagnostic artifacts" which can be traced to specific prehistoric cultures and time periods. The diagnostic artifacts from the Beehunter Site are evidence of prehistoric occupations of the site by the following cultures:

(a) The Allision-LaMotte Culture which is known to have been present in southwestern Indiana during the

Middle/Late Woodland period (approximately the beginning of the Christian era to 700 A.D.).

(b) The Albee Complex, which is known to have been present in Sullivan County, Indiana, during the Late Woodland period (appropriately 1000 A.D.).

(c) The Riverton Culture, which is known to have been present in Illinois and southern Indiana during the Terminal Archaic period (appropriately 1500 to 900 B.C.).

(d) The French Lick Phase, which is known to have been present in southern Indiana during the Late Archaic period (approximately 3500 to 1500 B.C.).

22. Visual observation and earth cores taken from the Beehunter Site have also shown the presence of a substantial "midden", or build-up of soil deposited through human occupation of the site. The midden extends below the plowzone of the site, and the portion below the plowzone appears to be undisturbed by farming. In addition, the cultural deposits are known to extend at least two feet below the surface in some locations on the site.

23. Based on the diagnostic and other artifacts on the Beehunter Site and the substantial midden on the site, it is highly probable that the Beehunter Site was occupied at times by at least four distinct prehistoric cultures over a period of several thousand years.

24. The depth of the midden on the site is strong evidence that one or more of those cultural occupations was intense and long-term. It is also probable that the site contains intact evidence of dwellings, hearths, and storage, cooking and refuse pits, which are critical to reconstruction of the features of the people.

25. Substantial middens are rare in archaeological sites in Indiana. Substantial middens which have been left intact are even more rare. The midden on the Beehunter Site, which is both extensive and substantially intact below the plowzone, makes the Beehunter Site a rare archaeological site with

unusually great potential as a source of knowledge about several prehistoric cultures in Indiana.

26. The presence of at least four distinct cultures on the same site, which permits comparative studies of different cultural adaptations to the same environment, also contributes to the significance of the Beehunter Site.

27. The Beehunter Site is especially significant within the framework of what is now known and not known about the cultures present at the Beehunter Site based on sites in other geographic areas.

28. The Beehunter Site was nominated for listing on the National Register of Historic Places as an archaeological site significant in American history or prehistory.

29. The Beehunter Site was found eligible for listing on the National Register of Historic Places. 51 Fed. Reg. 6677 (1986).

30. Surface mining operations on the Beehunter Site would destroy the archaeological resources present and would therefore cause significant and irreparable damage to those important resources. The loss of those archaeological resources would adversely affect members of Wabash Valley and CCIA by irrevocably destroying highly significant cultural and scientific resources relevant to professional and avocational research on Indiana's prehistory being carried out by those members.

31. Significant quantities of coal are present under the Beehunter Site and contiguous acreage. Three distinct coal seams are present. The uppermost and lowermost seams are each approximately 25 inches thick.

32. An additional seam approximately five inches thick is present under the Beehunter Site and between the uppermost and lowermost seams. This intermediate seam is localized, and its relative thinness will probably preclude mining.

33. Exclusive of acreage located west of the (former) Pennsylvania Railroad, and exclusive of the intermediate seam, the

Humer property contains approximately 1.537 million tons of coal. Located directly under the Beehunter Site are approximately 55,200 tons of coal, including 5,900 tons attributable to the intermediate seam.

34. Analysis of the three seams of coal underlying the Beehunter Site indicates the uppermost seam has a relatively high sulfur content (5.11%), nearly average ash content (18.40%) and an above average energy content (11,956 BTU/lb.). The intermediate seam has a relatively high sulfur content (4.77%), a high ash content (35.43%) and a low BTU rating (9,140 BTU/lb.). The lowermost seam is of relatively good quality (2.46% sulfur, 8.03% ash, and 13,592 BTU/lb.).

35. The year of 1984 saw record levels of coal production and associated high marketability in Indiana. Stockpiling during the winter of 1984-85, a general drop in demand for Indiana coal as a whole, and other economic considerations have reduced the current demand for Indiana-derived coal.

36. The coal present under the Beehunter Site is presumed to be marketable. The quality of coal contained in the uppermost seam, may however, require additional processing under existing marketing conditions. The current economic feasibility of marketing only the lowermost seam is questionable given its depth and relative thinness.

37. Designating the Beehunter Site as a land unsuitable for surface mining under Ind. Code §§ 13-4.1-14-1, *et seq.*, prevents surface coal mining from destroying archaeological features of a modest geographic area. The environmental consequences of the designation are locally positive, with the overall impact upon the natural environment being negligible.

38. Designating the Beehunter Site as land unsuitable for surface mining would remove approximately 100,000 tons of coal from production (assuming an additional 100 foot buffer zone around the site) under conventional surface mining methods. As much as sixty (60) percent of the impacted coal might be extracted through the use of alternative mining methods,

such as augering, if sufficient safeguards against future surface impacts were to be demonstrated and implemented. Completion of the mitigation plan set forth in the Appendix to the Director's order would allow recovery of 100% of the coal located beneath the Beehunter Site.

39. The State of Indiana has reported reserves of coal which may be recovered by surface mining, corrected for loss during the mining process, approximately 1,789 million tons. About 184 million tons are estimated to be recoverable within Greene County. The coal under the Beehunter Site constitutes a negligible portion of the coal which may be recovered by surface mining in Indiana and in Greene County.

40. During 1984, approximately 3.28 million tons of coal were produced from surface mining in Greene County. If the coal located under the Beehunter Site were to be unavailable for marketing, the impact on the economy of Greene County would be insignificant.

41. The mineable coal resources under the Beehunter Site, with a 100-foot buffer around the site, constitutes approximately 6.5% of the total coal resources located under the land owned by Humer. If alternative mining methods were to be employed, the loss might be reduced to less than 3% of the total coal resources. Completion of the mitigation plan would allow recovery of 100% of the coal located beneath the Beehunter Site.

42. The evidence in the record demonstrates that the archaeological resources of the Beehunter Site have unusually important historic, cultural and scientific value.

43. Surface coal mining of the Beehunter Site would cause significant and irreparable damage to the important archaeological resources of the Beehunter Site and thus to important historic, cultural and scientific values.

44. The supply of coal, the economy, and the environment will not be appreciably affected by designating the Beehunter Site unsuitable for surface coal mining.

45. Based upon the foregoing factors and the unusual importance of the archaeological resources of the Beehunter Site, the Director concluded that it was appropriate to exercise his discretion to designate the Beehunter Site unsuitable for surface coal mining.

46. The Director further found that the adverse effects of the destruction of the archaeological resources of the Beehunter Site would be effectively mitigated by the implementation of a program for recovery of archaeological data on the site. The Director found that the conditions for such a data recovery program set forth in the Appendix to his decision meet minimum professional archaeological standards and are reasonable, necessary and appropriate for conducting the data recovery program so as to make wise use of the archaeological resources on the Beehunter Site.

47. At the time of the filing of the Wabash Valley petition to designate the Beehunter Site unsuitable for mining, a coal company held an option on the Humer land (AC No. 85-261R, Tr. 253) and a mining permit application for Humer's land, including the Beehunter site, was pending. (AC No. 85-261R, Tr. 48-49). After the petition was filed, the option was dropped and the permit application withdrawn. *(Ibid).*

48. Using the $1.25 per ton value assumed by the Director's staff (AC No. 85-261R, Tr. 112-113), the coal beneath the Beehunter Site would be worth $69,000.00 in royalties to Humer.

49. Using the $1.25 per ton value assumed by the Director's staff (AC No. 85-261R, Tr. 112-113) the coal not able to be produced because of the designation would be worth $125,000.00 in royalties to Humer. If 60% of the coal were recovered by alternative mining methods, the 40% lost would be worth $60,000.00 in royalties to Humer. The cost of the Director's mitigation plan to Humer is estimated at approximately $50,000.00. (AC No. 85-261R, Tr. 114, 136-141).

50. The artifacts and other archaeology information present at the Beehunter Site are for the most part buried below

the surface of the earth. If properly excavated and analyzed, these artifacts and other archaeology information could provide valuable knowledge concerning Indiana prehistoric cultures. Unless excavated and analyzed at some point, the site has no informational value.

51. The property involved in the case at bar includes: the coal interests and the rights to mine under a portion of the real property in question; the archaeologic information, matter and control of the same; the use of and the digging or change of the real estate; the money necessary to pay for scientific and technical services and analyses.

52. The transformation and enhancement of the archaeologic information and matter through the technical and scientific services and analyses and the reclamation of the site in the case at bar have no economic justification from the landowner's standpoint.

53. During the time of any archaeological survey and digging at the site in question, there would be no other viable use of the site, whether for farming, coal mining or anything else.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this case.

2. The standard of review applicable here is set forth by the Administrative Adjudication Act ("AAA"). The Director's decision shall be upheld if the Director complied with the procedural requirements of the AAA and if his decision is supported by substantial, reliable, and probative evidence. Ind. Code § 4-22-1-18(b). However, if the Court finds that the Director's decision is:

> (1) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; or,
>
> (2) Contrary to constitutional right, power, privilege, or immunity; or,

(3) In excess of statutory jurisdiction, authority or limitations, or short [of] statutory right; or,

(4) Without observance of procedure required by law; or

(5) Unsupported by substantial evidence, the court may order the decision of determination of the agency set aside. The court may remand the case to the agency for further proceedings and may compel agency action unlawfully withheld or unreasonably delayed.

Ind. Code § 4-22-1-18(c).

3. The Court in *Penn Central Transportation Company v. City of New York*, (1978), 438 U.S. 105, 57 L.Ed.2d 631, 98 S. Ct. 2546, said at p. 648:

> "While this court has recognized that the 'Fifth Amendment's guarantee — (is) designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole, (Citation), this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather "than remain disproportionately concentrated on a few persons".

4. After reading a half dozen "taking" cases under the Fifth Amendment, the above is the only consistent rule that I could discern, which rule, unfortunately, begs the question posed in each case.

5. The recent case of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California* (1987), 55 LW 4781, held that temporary takings are no different in kind from permanent takings. Again, the court said:

> "It is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens, which, in all fairness and justice, should be borne by the public as a whole'."

6. As more fully set forth hereafter, the restrictions on Humer's property is not a proper exercise of police power nor can it be justified by the State's interest in promoting the health, safety and general welfare of the public, as in *Keystone Coal Association v. De Benedicitis*, (1987), 480 U.S. ___, 94 L.Ed.2d 472.

7. As applied to the claimant's property, the "areas unsuitable" statute, I.C. § 13-4.1-1-14, regulations and the Director's order in the case at bar constitute an illegal taking under the Fifth Amendment applicable to the states under the Fourteenth Amendment and the Indiana Constitution, Art. 1 § 21, because the interests sought to be protected thereunder, i.e., the preservation of historic, cultural, scientific and aesthetic values, important though they are, should be preserved at the expense of the public as a whole, and not solely by Humer, as owners of the property in question. This is particularly true under the facts of this cause because the public does not necessarily need to purchase the owner's interest in the archaeology site sought to be protected, but could merely underwrite the cost of archaeology excavation, which preserves the knowledge the site can provide and at the same time destroys it for such purposes. In other words, the public is not required to purchase the owner's coal rights — it need merely underwrite the cost of excavation, compilation and reviews, pay a reasonable rental in accordance with *First English Church*, and insure that the real property be returned to a condition capable of supporting the same uses as before if it will not be surface coal mined.

8. The State's interest being advanced through the areas unsuitable statutes (30 U.S.C. § 1272(a) and IC 13-4.1-14)), the regulations pursuant thereto, and the Director's order as applied to the archaeological site in question, is the preservation, acquisition and use of the archaeologic site, information and protection of aesthetic and scientific values and the preservation of significant and valuable information about Indiana's cultural heritage, at the sole cost and to the sole detriment of the landowner or some other party.

9. Site preservation is but a prelude to the acquisition and use of the archaeologic information and matter, which cannot be accomplished except at considerable cost with a direct physical intrusion and occupation of the real estate and at the risk of damage to the real estate unless it is properly reclaimed or immediately used thereafter for surface coal mining.

10. The "areas unsuitable" statutes, regulations and the Director's order concerning the removal of the areas unsuitable designation demonstrate fully the nature of the state's interest — the enforced acquisition and use of the archaeological information and matter, the use of and possible damage to the real estate, plus, the required expenditure of the landowner's personal property (i.e., the cost of services and reclamation), all without any compensation to the landowner. These required or enforced uses and expenditure of funds to the sole benefit of the State are, therefore, no different than if the State would directly do so, which are contrary to the physical intrusion or taking cases under the Fifth Amendment as applied to the states through the Fourteenth Amendment, *Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419 (1982), *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. ___, 96 L.Ed.2d 250 (1987). These conditions do not effectuate a collateral or separate legitimate State interest other than the acquisition, use or possible destruction of property interests in question. This purpose may be sufficient to support the exercise of the eminent domain power (which power has not been put at issue in the case at bar). However, when such purpose is attempted but without just compensation, it is not a "legitimate state interest". *See Nollan v. California Coastal Comm'n*, 483 U.S. ___, 97 L.Ed.2d 677, 689 (1987). This also renders the attempted exercise of the police power unlawful (*See* Conclusion No. 6).

11. The permit application pending at the filing of the petition and the coal lease option were thereafter dropped. The fact that Humer did not accede and bear the costs of the archae-

ologic survey and that there has been no "take" to date, does not change the analysis or the result, *Nollan, supra.* It remains that the "areas unsuitable, statutes, regulations and the Director's order as applied in the case at bar contravene the Fifth Amendment as applied to the states through the Fourteenth Amendment and the Indiana Constitution, Art. 1, § 21.

12. Even if the case at bar is seen in part as a land use regulation case, the unlawful taking result still obtains. *Nollan, supra,* emphasizes that an unlawful taking occurs if a land use regulation does not "substantially advance" a legitimate state interest, while acknowledging that,

> Our cases have not elaborated on the standards for determining what constitutes a "legitimate state interest" or what type of connection [nexus] between the regulation and the state interest satisfies the requirement that the former "substantially advanced" the latter. [97 L.Ed.2d at 688.]

The majority opinion in *Nollan* expressly disagreed with the position set forth in Justice Brennan's dissenting opinion that the nexus test should be under the looser nexus standards of due process or equal protection, stating:

> Contrary to Justice Brennan's claim, *post,* at ____, our opinions do not establish that these standards are the same as those applied to Due Process or Equal Protection claims. To the contrary our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved. . . . [97 L.Ed.2d at 688, n.3 .].

13. In the case at bar, applying this *Nollan* substantial advancement nexus test that the regulation must "substantially advance" a legitimate state interest (even assuming the latter to exist) this test transposes to — does the declaration of an archaeology site as an area unsuitable for surface coal mining substantially advance preserving the site, using the term in its purest sense of only keeping the raw site undisturbed so

that such can later be acquired, developed and analyzed by the State?

14. The beginning point of the analysis under the foregoing issue in the case at bar requires a determination of what property owners can do with or to the archaeology site even in face of the statutory scheme. There is no doubt and the State does not contest that the fee owner owns the site and the buried archaeologic matter and information. *See Favorite v. Miller* (1978), 176 Conn. 310, 407 A.2d 974, 976-78; *Klein v. Unidentified Wrecked Vessel*, 758 F.2d 1511 (11th Cir. 1985); *Willsmore v. Twp. of Ocebla* (1981), 106 Mich. App. 671, 308 N.W.2d 796, 803-4; *Allred v. Bieqel*, (1949), 240 Mo. App. 818, 219 S.W.2d 665, and *generally*, 1 Am.Jr.2d § 4 *Abandoned, Lost Property* and 63A Am.Jr.2d § *Property.*

15. There are no statutes, federal or state, which attempt to acquire and preserve, on a special use basis or otherwise, archaeology sites which are not owned by the State or the Federal government. Even the Federal and Indiana Historic or Archaeology Preservation Acts (IC 14-3.3-1 and 3.4-1 and 16 U.S.C. § 470f and aa) only protect archaeology sites not owned by the Federal or Indiana governments from government financed projects. Neither grants eminent domain power.

16. There is no other protection to archaeology sites from destruction by use or otherwise except through the "areas unsuitable" statutes and orders issued pursuant thereto as in the case at bar.

17. The result of the analysis is several anomalous situations. If the archaeology site no longer existed before a petition was filed, the site could not be the basis for the area being found to be unsuitable for surface coal mining, in which event a landowner suspecting an archaeological site overlying coal could have it destroyed under one guise or another. If the site ceases to exist by reason of use or destruction other than by surface coal mining after being declared unsuitable for coal mining, then such areas unsuitable designation would be eligible for a termination pursuant to 310 I.A.C. 12-2-6(c) except for

the effect of the conditions in the Director's order. The intended effect of the Director's order is that should the archaeology site be destroyed through a non-coal mining use or otherwise without compliance with the Director's order, the designation of unsuitability would, therefore, not be removed — ever. The loss of the right to surface mine the coal becomes a potential penalty to the landowner if the landowner does not incur all the burdens of the order. Assuming that such an intended effect is within the statutory authority of the Director (which issue this Court does not reach), this effect only serves to highlight that the intended effect of the statutory scheme, regulation and order, that is, acquiring various property interests of the landowner as previously set forth without compensation, is not a legitimate state interest. There is nothing to protect the archaeology site from other uses by, not to mention the possible enmity of, the landowner except the penalty to the landowner of losing the right to surface mine the coal. The economics of the situation do not provide any impetus to the landowner to incur the burdens attempted to be imposed by the Director's order since the lost royalties are at best equal to the cost of the archaeology survey with the landowner still bearing the risk of reclamation if the coal is not mined. A very probable result in the case at bar with the chance for a surface coal mining permit already having come and gone, is that the State will lose the benefit of both resources, the coal and the archaeology. Further, if this intended effect of the order is not lawful (as being an unlawful taking, or outside the statutory authority which question again is not reached), then the likelihood of the loss of the archaeology site becomes even more certain, as does the conclusion that the land use regulation does not "substantially advance" a legitimate state interest because there would be nothing which even indirectly would prevent the landowner from destroying the archaeology site.

The conclusion under *Nollan*, *supra*, is that the land use regulatory scheme in the case at bar results in an unlawful taking. As this Court has previously concluded if the State abides by the Fifth Amendment requirements, the archaeology can be acquired without having to purchase coal interest.

For all the foregoing reasons, the Court concludes that the Director's designation of the Beehunter Site as unsuitable for surface coal mining should be set aside, and remanded for further consideration of Humer's mitigation plan.

DATED this 24th day of November, 1987.

/s/ Hugo C. Songer

HUGO C. SONGER, JUDGE
DUBOIS CIRCUIT COURT

STATE OF INDIANA

BEFORE THE
DIRECTOR
OF THE
DEPARTMENT OF NATURAL RESOURCES

IN THE MATTER OF:	)	
	)	
INDIANA COAL COUNCIL, INC. and HUNTINGBURG MACHINERY & EQUIPMENT RENTAL INC., CLAIMANTS,	)	
	)	
VS	)	
	)	
DEPARTMENT OF NATURAL RESOURCES, RESPONDENT,	)	
	)	ADMINISTRATIVE
AND	)	CAUSE NO.:
	)	85-261R
WABASH VALLEY ARCHAEOLOGICAL SOCIETY, INC., RESPONDENT-INTERVENOR,	)	
	)	
AND	)	
	)	
COUNCIL FOR THE CONSERVATION OF INDIANA ARCHAEOLOGY, INC. RESPONDENT-INTERVENOR.	)	

FINDINGS OF FACT AND ORDER
OF THE
DIRECTOR OF THE DEPARTMENT
OF NATURAL RESOURCES

After due consideration of the Report, Proposed Findings of Fact and Recommended Order of the Administrative Law Judge filed December 23, 1985, written objections of Huntingburg Machinery and Equipment Rental, Inc. and Indiana Coal Council filed January 2, 1986 and oral arguments held on January 2, 1986, I enter the following Findings of Facts and Order.

I. FINDINGS OF FACT

1. On November 19, 1985, the Director of the Department of Natural Resources ("the Director"), pursuant to petition, issued an initial determination, that the Beehunter site is a land unsuitable for surface coal mining, as provided for in IC 4-22-1-25, IC 13-4.1-14 and 310 IAC 12-2.

2. On December 2, 1985, the Indiana Coal Council, Inc. ("ICC") filed objections to the Director's initial determination and requested that a hearing be conducted pursuant to IC 4-22-1 and 310 IAC 0.5 prior to entry of a final order.

3. On December 4, 1985, Huntingburg Machinery and Equipment Rental, Inc. ("HUMER") filed objections to the Director's initial determination and requested that the decision be vacated in its entirety and the proceeding be dismissed with prejudice, or that a hearing be conducted pursuant to IC 4-22-1 and 310 IAC 0.5 prior to the entry of a final order.

4. On December 10, 1985 leave for the Wabash Valley Archaeological Society, Inc. ("Wabash Valley") and Council for the Conservation of Indiana Archaeology, Inc. ("CCIA") to intervene in this proceedings was granted.

5. IC 13-4.1, the Surface Coal Mining and Reclamation Act, applies to this proceeding.

6. The Department of Natural Resources is an agency as defined in IC 4-22-1. The Director of the Department of Natural Resources is the ultimate authority of the Department with respect to this proceeding.

7. The Director has jurisdication over the subject matter and parties to this action.

8. Pursuant to IC 4-22-1, the Director appointed Sue A. Shadley, administrative law judge ("ALJ"), for the purposes of conducting the hearing requested herein, and making a recommendation to him.

9. 310 IAC 12-2-9(c) requires the Director issue a final written decision on a lands unsuitable petition within sixty (60) days of completion of the public hearing.

10. The public hearing was held and completed on November 4, 1985.

11. On December 3, 1985, a Notice of Pre-Hearing Conference and Notice of Hearing was issued by the ALJ concerning the ICC request for hearing. The Pre-Hearing was scheduled for December 17, 1985, and the Hearing was scheduled for December 19, 1985.

12. On December 5, 1985 a Notice of Consolidation, of the ICC and HUMER hearing requests was issued by the ALJ, with the pre-hearing conference to be held on December 17 and the hearing to be held on December 19.

13. The Notice of Pre-Hearing Conference and Notice of Hearing and the Notice of Consolidation were sent by certified mail to:

James F. Maguire, President
Indiana Coal Council, Inc.
701 Harrison Building
143 West Market Street
Indianapolis, IN 46204

James M. Buthod, Attorney
for HUMER
BUTHOD, LONGEST, CLARK,
RIETMAN, STEEDMAN & LINK
115 S. E. Third Street

Suite 409
Evansville, IN 47708

C. Michael Anslinger
President
Wabash Valley Archaeological
Society, Inc.
1626 South Fourth Street
Terre Haute, IN 47803

Dean C. Higginbotham,
Resident Agent
Council for the Conservation
of Indiana Archaeology, Inc.
R.R. 1, Box 28
Ownesville, IN 47665

Iain Dolandson, President
J H & L Coal Company
8874 South 25th Street
Terre Haute, IN 47802

Federal Land Bank of Louisville
201 West Main Street
Louisville, KY 40202

David Joest, Attorney
Indiana Coal Council
c/o Peabody Coal Company
P. O. Box 1112
Evansville, IN 47706

Lee Ray Olinger
Resident Agent
HUMER
Orchard Ridge
Huntingburg, IN 47542

Tom Charles Huston and
David F. Hamilton
for Wabash Valley & CCIA

BARNES AND THORNBURG
1313 Merchants Bank Bldg.
Indianapolis, IN 46204

Max Olinger
Star Route
Huntingburg, IN 47542

Steve Chancellor, Pres.
Black Beauty Coal Co.
P.O. Box 312
Evansville, IN 47702

14. The Notice of Pre-Hearing Conference and Notice of Hearing and Notice of Consolidation were also sent to:

Steven J. Szostek
Deputy Attorney General
Division of Reclamation
309 W. Washington St., Rm 201
Indianapolis, IN 46204

Robert E. Pace
Anthropology Museum and Lab
Indiana State University
Terre Haute, IN 47809

James H. Kellar
Glenn Black Laboratory of
Archaeology
9th and Fess Streets
Bloomington, IN 47405

Dept. of Anthropology
Ball State University
Muncie, IN 47302

15. Pre-Hearing Conference was held on December 17, 1985, at which time the parties were afforded the opportunity for the settlement or adjustment of their claim. It was determined that settlement was not possible.

16. Hearing was held on December 19, 1985.

17. The land at issue in this proceeding is an archaeological site known as the "Beehunter Site" in Greene County. The Beehunter Site occupies an area of approximately 440 feet by 650 feet (6.57 acres) atop a broad bluffline spur that overlooks a former marsh area associated with Beehunter Ditch. Boundaries of the Beehunter Site have been determined by the density of archaeological materials observed during three informal surface surveys, with a scatter of archaeological materials over a larger area. The greatest density of cultural materials occurs within a more limited area of approximately 195 feet by 163 feet centered on the highest elevation, near the western boundary of the site. The Beehunter Site is located 1.2 miles southwest of the town of Lyons and 0.2 miles east of State Highway 67 in Greene County within the NE 1/4 of the NW 1/4 of the SE 1/4 of the NW 1/4 and the NW 1/4 of the NE 1/4 of the SE 1/4 of the NW 1/4 of Section 8, T6N, R6W, USGS 7.5 minute Lyons Quandrange.

18. Wabash Valley is an Indiana not-for-profit corporation. It is an avocational organization which promotes archaeological study of Indiana's prehistory by, among other things, assisting professional archaeologists and educating the public regarding Indiana's prehistory. Wabash Valley filed the original petition seeking to have the Beehunter Site designated unsuitable for surface mining. Wabash Valley has intervened in this matter in support of the Director's initial determination.

19. The CCIA is an Indiana not-for-profit corporation which has intervened in support of Wabash Valley's petition and the Director's initial determination. The CCIA is an organization of professional Indiana archaeologists which promotes the preservation, conservation, and wise use of Indiana's archaeological resources.

20. Claimant, ICC, is a trade association representing the Indiana coal industry.

21. Claimant, HUMER, is the owner of the Beehunter Site and adjacent farmland.

22. Members of Wabash Valley have made use of the archaeological resources of the Beehunter Site by visiting the site, surveying and collecting artifacts, studying, analyzing, and curating those artifacts, studying the professional survey records of the site, and nominating the site for listing on the National Register of Historic Places. Wabash Valley members are also engaged in fieldwork and research on the several prehistoric cultures which appear to have occupied the Beehunter Site. The foregoing activity has been within the scope of Wabash Valley's purposes.

23. Members of CCIA have made use of the archaeological resources of the Beehunter Site by visiting the site, surveying and collecting artifacts, studying, analyzing, and curating those artifacts, studying the professional survey records of the site, and nominating the site for listing on the National Register of Historic Places. In addition, CCIA members are engaged in professional research on related archaeological sites and the several prehistoric cultures which appear to have occupied the Beehunter Site. The foregoing activity has been within the scope of CCIA's purposes.

24. Three limited, but professional, archaeological surface surveys of the Beehunter Site have revealed dense distributions of numerous archaeological artifacts including flint blades, flint chips, chert chips, and numerous pottery fragments.

25. Among the Beehunter Site artifacts are several "diagnostic artifacts" which can be traced to specific prehistoric cultures and time periods. The diagnostic artifacts from the Beehunter Site are evidence of prehistoric occupations of the site by the following cultures:

(a) The Allision-LaMotte culture which is known to have been present in southwestern Indiana during the Middle/Late Woodland period (approximately the beginning of the Christian era to 700 A.D.).

(b) The Albee Complex which is known to have been present in Sullivan County, Indiana, during the Late Woodland period (approximately 1000 A.D.).

(c) The Riverton Culture, which is known to have been present in Illinois and southern Indiana during the Terminal Archaic period (approximately 1500 to 900 B.C.).

(d) The French Lick Phase, which is known to have been present in southern Indiana during the Late Archaic period (approximately 3500 to 1500 B.C.).

26. Visual observation and earth cores taken from the Beehunter Site have also shown the presence of a substantial "midden," or build-up of soil deposited through human occupation of the site. The midden extends below the plowzone of the site, and the portion below the plowzone appears to be undisturbed by farming. In addition, the cultural deposits are known to extend at least two feet below the surface in some locations on the site.

27. Based on the diagnostic and other artifacts on the Beehunter Site and the substantial midden on the site, it is highly probably that the Beehunter Site was occupied at times by at least four distinct prehistoric cultures over a period of several thousand years.

28. The depth of the midden on the site is strong evidence that one or more of those cultural occupations was intense and long-term. It is also probable that the site contains intact evidence of dwellings, hearths, and storage, cooking and refuse pits, which are critical to reconstruction of the features of the people.

29. Substantial middens are rare in archaeological sites in Indiana. Substantial middens which have been left intact are even more rare. The midden on the Beehunter Site, which is both extensive and substantially intact below the plowzone, makes the Beehunter Site a rare archaeological site with unusually great potential as a source of knowledge about several prehistoric cultures in Indiana.

30. The presence of at least four distinct cultures on the same site, which permits comparative studies of different cultural adaptations to the same environment, also contributes to the significance of the Beehunter Site.

31. The Beehunter Site is especially significant within the framework of what is now known and not known about the cultures present at the Beehunter Site based on sites in other geographic areas.

32. The Beehunter Site was nominated for listings on the National Register of Historic Places as an archaeological site significant in American history or prehistory.

33. The Beehunter Site was found eligible for listing on the National Register of Historic Places.

34. Surface mining operations on the Beehunter Site would destroy the archaeological resources present and would therefore cause significant and irreparable damage to those important resources. The loss of those archaeological resources would adversely affect members or Wabash Valley and CCIA by irrevocably destroying highly significant cultural and scientific resources relevant to professional and avocational archaeological research on Indiana's prehistory being carried out by those members.

35. Significant quanties of coal are present under the Beehunter Site and contiguous acreage. Three distinct coal seams are present. The uppermost and lowermost seams are each approximately 25 inches thick.

36. An additional seam approximately five inches thick is present under the Beehunter Site and between the uppermost and lowermost seams. This intermediate seam is localized, and its relative thinness will probably preclude mining.

37. Exclusive of acreage located west of the (former) Pennsylvania Railroad, and exclusive of the intermediate seam, the HUMER property contains approximately 1.537 million tons of coal. Located directly under the Beehunter Site are approx-

imately 55,200 tons of coal, including 5,900 tons attributable to the intermediate seam.

38. Analysis of the three seams of coal underlying the Beehunter Site indicates the uppermost seam has a relatively high sulfur content (5.11%), nearly average ash content (18.40%) and an above average energy content (11,956 BTU/lb.). The intermediate seam has a relatively high sulfur content (4.77%), a high ash content (35.43% and a low BTU rating (9,140 BTU/lb.). The lowermost seam is of relatively good quality (2.46% sulfur, 8.03% ash, and 13,592 BTU/lb.).

39. The year of 1984 saw record levels of coal production and associated high marketability in Indiana. Stockpiling during the winter of 1984-85, a general drop in demand for Indiana coal as a whole, and other economic considerations have reduced the current demand for Indiana-derived coal.

40. The coal present under the Beehunter Site is presumed to be marketable. The quality of coal contained in the uppermost seam, may, however, require additional processing under existing marketing conditions. The current economic feasibility of marketing only the lowermost seam is questionable given its depth and relative thinness.

41. Designating the Beehunter Site as a land unsuitable for surface mining under IC 13-4.1-14 would prevent surface coal mining from destroying archaeological features of a modest geographic area. The environmental consequences of the designation would be locally positive, with the overall impact upon the natural environment being negligible.

42. Designating the Beehunter Site as land unsuitable for surface mining would remove approximately 100,000 tons of coal from production (assuming an additional 100 foot buffer zone around the site) under conventional surface mining methods. As much as sixty (60) percent of the impacted coal might be extracted through the use of alternative mining methods, such as augering, if sufficient safeguards against future surface impacts were to be demonstrated and implemented. Comple-

tion of the mitigation plan set forth in the Appendix of this order, below, would allow recovery of 100% of the coal located beneath the Beehunter Site.

43. The State of Indiana has reported reserves of coal which may be recovered by surface mining, corrected for loss during the mining process, approximating 1,789 million tons. About 184 million tons are estimated to be recoverable within Greene County. The coal under the Beehunter Site constitutes a negligible portion of the coal which may be recovered by surface mining in Indiana and in Greene County.

44. During 1984, approximately 3.28 million tons of coal were produced from surface mining in Greene County. If the coal located under the Beehunter Site were to be unavailable for marketing, the impact on the economy of Greene County would be insignificant.

45. The mineable coal resources under the Beehunter Site, with a 100 foot buffer around the site, constitutes approximately 6.5% of the total coal resources located under the land owned by HUMER. If alternative mining methods were to be employed, the loss might be reduced to less than 3% of the total coal resources. Completion of the mitigation plan set forth in the Appendix of the order, below, would allow recovery of 100% of the coal located beneath the Beehunter Site.

46. Because members of Wabash Valley and CCIA have made use of the archaeological resources of the Beehunter Site and would be adversely affected by the destruction of those resources, Wabash Valley and CCIA both have standing on behalf of their members to pursue the original petition to designate the Beehunter Site unsuitable for surface mining and to intervene in this proceeding.

47. The Beehunter Site has been determined eligible for listing on the National Register of Historic Places and therefore constitutes "historic lands" within the meaning of IC 13-4.1-14-4(b)(2), 310 IAC 12-1-3 and 310 IAC 12-2-3(b)(2).

48. The determination by state and federal authorities that the Beehunter Site is eligible for listing on the National Register of Historic Places constitutes some evidence, but is not dispositive that the Beehunter Site's archaeological resources have important historic, cultural, scientific or esthetic value within the meaning of IC 13-4.1-14-4(b)(2) and 310 IAC 12-2-3(b)(2).

49. The evidence in the record demonstrates that the archaeological resources of the Beehunter Site have unusually important historic, cultural and scientific value.

50. Surface coal mining of the Beehunter Site would cause significant and irreparable damage to the important archaeological resources of the Beehunter Site and thus to important historic, cultural and scientific values.

51. The supply of coal, the economy, and the environment will not be appreciably affected by designating the Beehunter Site unsuitable for surface coal mining.

52. Based upon the foregoing factors and the unusual importance of the archaeological resources of the Beehunter Site, the Director concludes that it is appropriate to exercise his discretion to designate the Beehunter Site unsuitable for surface coal mining.

53. The Director further finds that the adverse effects of the destruction of the archaeological resources of the Beehunter Site would be effectively mitigated by the implementation of a program for recovery of archaeological data on the site. The Director finds that the conditions for such a data recovery program set forth in the appendix to this decision meet minimum professional archaeological standards and are reasonable, necessary and appropriate for conducting the data recovery program so as to make wise use of the archaeological resources on the Beehunter Site.

II. ORDER

The Beehunter Site is hereby designated unsuitable for the conduct of surface coal mining operations, provided however, the site is not unsuitable for underground mining activities where there would be no surface affects within the boundaries of the Beehunter Site, nor is it unsuitable for mining, pursuant to an approved auger mining plan. The unsuitable designation will terminate if I find that a program for data recovery has been implemented in accordance with the requirements set forth in the Appendix attached hereto.

Dated: January 3, 1986

/s/ James M. Ridenour

James M. Ridenour
Director

APPENDIX

MITIGATION PROGRAM FOR RECOVERY OF ARCHAEOLOGICAL DATA PRIOR TO SURFACE COAL MINING OF BEEHUNTER SITE

The designation of the Beehunter Site as unsuitable for surface coal mining operations shall terminate if the Director of the Department of Natural Resources finds that the following mitigation plan for recovery of archaeological data has been implemented. The director may, after notice to affected persons and opportunity for hearing, modify the mitigation plan or approve an alternate mitigation plan.

1. Mitigation shall be performed by an archaeological contractor substantially in conformance with standards and conditions set forth in this Appendix in order to qualify the Beehunter Site for surface coal mining under IC 13-4.1. Selection of the archaeological contractor is subject to prior approval by the Director of the Department of Natural Resources.

2. The archaeological contractor shall supply the necessary professional and technical personnel, field and laboratory facilities, testing, excavation, analytical and conservation supplies and materials; and other equipment as is necessary to conduct the archaeological data recovery operation.

3. Acceptable mitigation of the Beehunter Site by archaeological data recovery shall be achieved by the utilization of a two-phased approach consisting of site testing and data recovery.

A. The first phase shall entail a rigorous and systematic evaluation of the nature and extent of the surface and subsurface deposits, commencing with a controlled surface collection of the Beehunter Site. Results of the surface collection shall guide the archaeological contractor in investigating subsurface deposits, in determining the proper placement of hand excavation units and in providing systematic coring and augering of the site. The plowzone shall be removed by hand excavation to determine the integrity of the cultural horizons and to better

define the vertical limits of those horizons. This testing phase will address not more than 5% of the site surface area; and, performed in systematic fashion, testing will facilitate the expeditious verification of horizontal and vertical deposits. The test excavation shall employ field screening using 1/4 inch hardware cloth for all test excavation unit soils not otherwise encumbered for feature, geological-geochemical, radiocarbon and palynological analyses and for those soils reserved for flotation sampling. Archaeological features shall be bisected and profiled so that no less than 50% of each feature is recovered for analysis. Flotation shall be required for fill recovered from any feature.

B. If archaeological testing activities indicate that no preserved sub-plowzone deposits with recoverable context exist at the Beehunter Site, the Director may declare the Beehunter Site to be a land suitable for surface coal mining operations under IC 13-4.1.

C. The second phase shall provide for data recovery and shall not be commenced until the Director is satisfied that the requirements of the first phase have been satisfied. The second phase shall be performed if sub-plowzone deposits with recoverable contexts are found to exist during archaeological testing activities. In performing the second phase, hand-excavation units shall be utilized which extend from or encompass the phase one testing units as is necessary to recover intact cultural deposits. The plowzone may be exclusively hand excavated, or may, with approval of the Director, be machine excavated to not deeper than one inch above the base of the plowzone, with the remainder of the plowzone to be hand excavated. The data recovery excavation shall employ the same standards and requirements for screening and for analysis as required for the testing phase.

4. The first phase of mitigation shall be performed in accordance with the following objectives: to demonstrate the presence, nature and extent of recoverable cultural features related to prehistoric cultural groups; to provide a preliminary identifi-

cation and evaluation of the widest range of data categories with respect to those cultures; to develop a preliminary map of the site's cultural horizons, including surface and subsurface horizons; to determine the limits of recoverable cultural deposits; and, to develop a cogent cost-effective data recovery plan.

5. The second phase of mitigation shall execute a comprehensive data recovery operation which focuses on the data categories and features identified during the testing and previous archaeological investigations and which will inform with respect to the following objectives: to provide a site chronology and a clear separation of cultural occupations; to identify the nature and extent of the cultures present, including site utilization, intrasite patterns, settlement patterns, subsistence patterns, diet and health; to address the problem of cultural change within the local and regional context; to evaluate the differences and similarities in patterns between the Beehunter Site and other occupations within southwestern Indiana; to address the technology of the cultural groups occupying the Beehunter Site and technological change; to address social organization, population demographics, mortuary practices, religion and other relevant sociocultural questions for the groups occupying the Beehunter Site; and, to evaluate paleoenvironmental change and its relationship to changing cultural patterns at the Beehunter Site.

6. In order to accomplish the objectives, the data recovery may require specialized statistical techniques to organize and assist in data analysis and interpretation. Any mitigation proposal must, at a minimum, provide for chronometric dating, for specialized floral, faunal, palynological, geological-geochemical identification and analysis, and for burial analysis.

7. The archaeological contractor must maintain a complete and thorough record of field work and related activities including field notes, forms and maps. The contractor shall insure that a complete and annotated photographic record of the testing and data recovery investigation will be made. To insure against loss of documentation, at least one complete copy of all

site investigation documents must be submitted to the Department of Natural Resources. The original site investigation documents shall be curated at a facility approved by the Director. Following adequate analysis, disposition of the artifact collections will be subject to landowner's approval.

8. The report of investigations shall include a detailed discussion of the services rendered by the archaeological contractor. The archaeological contractor must furnish one bound copy of the final report to the Division of Historic Preservation and Archaeology. Photographs must contain an appropriate scale and directional arrow located clearly in the frame. Soil color description should be in Munsell terminology. Texts and line drawings should be clean, clear, and easily reproduced. Photographs should be original black and white positive prints, or high quality reproductions. Typescript should be single spaced. All pages should be numbered in sequence.

9. An agency, institution, corporation, association, or individual will qualify to participate in the mitigation of the Beehunter Site only if it satisfies the minimum criteria set forth in 36 CFR, Part 66. Mitigation proposals must include vitae/resumes for the principal investigators, main supervisory personnel and consultants in support of their academic and experience qualifications for this type of project.

10. The Director may designate staff members from the Department to communicate with the archaeological contractor and to furnish information for the timely, cost-effective and efficient mitigation of the site. The archaeological contractor must coordinate its activities with the Department during all phases of work. The Director may provide for the inspection of mitigation activities by the Division of Reclamation archaeologists or another staff member of the Department. Sanctions may be imposed by the Department against the archaeological contractor for failure to conform to mitigation standards or requirements.

11. Human skeletal remains recovered during mitigation are viable and contributing data and must be handled in a

sensitive fashion by specialists in physical anthropology. The archaeological contractor must make arrangements for the proper curation of human skeletal remains at a recognized institution staffed with personnel who conduct research in physical anthropology. If the skeletal remains are related to a specific group of people whose descendants are living in Indiana, the archaeological contractor shall coordinate and consult with the Division of Historic Preservation and Archaeology to ensure their appropriate disposition. No human skeletal remains recovered during mitigation may be placed on public display.

STATE OF INDIANA

IN RE MATTER OF	)	Filed with the Director
	)	Dept. of Natural
THE PETITION OF THE	)	Resources
WABASH VALLEY	)	Date: Nov. 12, 1985
ARCHAEOLOGY	)	ADMINISTRATION
ASSOCIATION, INC. TO	)	CAUSE NO.
DESIGNATE LANDS AS	)	84-291-R
UNSUITABLE FOR SURFACE	)	
COAL MINING OPERATIONS	)	

AMENDED OFFER RELATIVE TO BEEHUNTER SITE

Huntingburg Machinery & Equipment Rental, Inc. ("Humer"), intervenor herein, having heretofore filed in this cause its "Offer to Permit Inspection and Evaluation of Site" hereby amplifies and amends its prior offer in accordance with the terms and provisions hereof. Humer, by this amended offer, hereby offers to permit the conduct of an investigation and evaluation for archaeological purposes of the site described in the petition as the Beehunter Site, and the recovery of artifacts and other relevant materials therefrom (hereinafter referred to collectively as the "Activities"), upon such terms and conditions as may be reasonable, and generally upon the following express terms, conditions and provisions:

1. All of the Activities shall be conducted under the supervision and control of the Project Sponsor designated by the Department of Natural Resources. The Project Sponsor shall be a person, firm or organization which is deemed by the Department of Natural Resources to be financially responsible and professionally qualified to conduct and supervise the Activities, and which is willing to accept the responsibilities of so doing in accordance with the provisions hereof.

2. The Activities shall be conducted without cost, risk or expense to Humer, except for such losses as may result from the loss of use of tillable land as a result of and during the period of the Activities.

3. Humer shall be indemnified and held harmless of and from any and all claims, losses or damages in anyway arising out of or related to the Activities conducted on the premises; and shall be furnished, prior to the commencement of any Activities on the permises, certificates of insurance showing that there are in force, and will be maintained in force at all times during the conduct of the Activities, policies of public liability and property damage insurance in amounts reasonably calculated to cover all risks incident to the conduct of the Activities on the premises.

4. All Activities shall be conducted during daylight hours on days other than Sundays and holidays. Activities may be conducted on Sundays and holidays with the specific approval of Humer.

5. Humer shall be given at least forty-eight (48) hours advance notice, in writing or by telephone, prior to the commencement of any Activities on the premises, such notice to be given to Humer at its offices in Huntingburg, Indiana.

6. Representatives of Humer shall have the right to be present on site at all times during the conduct of any Activities on the premises, and the right to observe all Activities conducted at the site.

7. No artifacts shall be removed from the site until the same have been identified and catalogued and the pertinent information relating thereto furnished to Humer.

8. Humer shall retain title to all artifacts discovered on the premises, but the Project Sponsor and its associated entities shall have the right to temporary possession thereof for such reasonable times during and subsequent to the conduct of operations as may be required for the evaluation, identification and correlation thereof with other pertinent data.

9. Humer shall be reimbursed for all damages to growing crops resulting from the conduct of the Activities, and for any residual land damages remaining after the cessation of the Activities and the restoration of the surface of the lands. At Humer's request, the project sponsor shall cause to be furnished to Humer appropriate assurances of the availablity of funds to reimburse Humer for such damages.

10. If any excavations to be conducted as a part of the Activities is expected to go deeper than topsoil level over an area which would substantially affect the subsequent utility of the premises for farming purposes, the topsoil shall be removed and separately stockpiled for preservation. Upon completion of the Activities, such excavations shall be backfilled and the topsoil replaced without cost or expense to Humer.

11. Humer agrees that during the Activity Period (which shall extend from the date of filing of this offer through termination of the Activities as hereinafter provided) Humer will refrain from cultivating or otherwise disturbing the Beehunter Site and will permit access thereto over the other lands of Humer at points designated by Humer. Except for such access routes, the Activities shall be conducted in such manner as not to interfere with the farming and other operations of Humer with respect to the balance of Humer's adjoining lands.

12. Such Activities may be commenced at any time hereafter and may be continued from time to time under December 31, 1986, without further authorization from Humer. Thereafter, such Activities may be continued, subject to the further provisions hereof, unless and until Humer gives notice of termination as herein provided. Humer may, at any time subsequent to December 31, 1986, give notice that it intends to commence or cause to be commenced mining operations on Humer's lands of which the Beehunter Site is a part. Such notice shall be given only if Humer has in fact good faith plans to commence or cause to be commenced such mining, and the notice shall fix a day, not sooner than 120 days after the giving of such notice, within

which the Activities shall be terminated on Humer's property. On or before the termination date, all of the Activities shall be terminated and all of the property and equipment placed on the affected lands by the Project Sponsor shall be removed and the topsoil restored as hereinabove provided; PROVIDED, HOWEVER, that if weather and ground conditions do not permit the restoration of the topsoil at or before the date of such termination, the restoration of the topsoil may be deferred until such time as land conditions render the same practical. In any event, however, and irrespective of any intent to mine, all of the Activities shall be completed and terminated without further action or request on the part of Humer on or before December 31, 1988, unless such time be extended expressly and in writing by Humer.

13. This offer is conditioned upon a finding by the Director of the Department of Natural Resources, pursuant to 310 IAC 12-2-9(a) that the terms and provisions of this offer will successfully mitigate the impact of future mining operations upon the Beehunter Site, and a finding that as so mitigated, the lands comprising the Beehunter Site are not unsuitable for mining by conventional surface mining methods, conducted subsequent to the cessation of the Activities as defined herein.

14. Determination by the Department of Natural Resources that the Beehunter Site is unsuitable for mining, even as so mitigated, shall terminate the offer contained herein; and upon such determination and finding, whether on a preliminary or final basis, the offer contained herein shall be deemed withdrawn.

Humer, its officers and counsel hereby further offer to meet with representatives of all interested parties to formalize an agreement for the conduct of the Activities on the premises, the designation of the project sponsor, and such other matters as may be appropriate and to reduce the same to writing for approval of the Department of Natural Resources.

Respectfully submitted,

HUNTINGBURG MACHINERY AND EQUIPMENT RENTAL, INC.

By: /s/ James M. Buthod

James M. Buthod

BUTHOD, LONGEST, CLARK, RIETMAN, STEEDMAN & LINK
115 S.E. 3rd St., Suite 409
Evansville, Indiana 47708

AMENDMENT V — GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces. or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV — CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Sec. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. No persons shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But

Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Sec. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Chapter 14. Designation of Lands Unsuitable for Surface Coal Mining.

13-4.1-14-1 Lands on which surface mining prohibited; planning

Sec. 1. (a) Subject to valid existing rights which exist prior to August 3, 1977, and except for those operations which existed on August 3, 1977, no surface coal mining operation may exist:

(1) on any land within the boundaries of units of the National Park System, the National Wildlife Refuge Systems, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, including study rivers designated under P.L.90-542, as amended, the Wild and Scenic Rivers Act, and National Recreation Areas designated by any act of the United States Congress;

(2) on any federal land within the boundaries of any national forest; however, surface coal mining operations are allowed on those lands if the United States Secretary of the Interior finds that there are no significant recreational, timber, economic, or other values which are incompatible with surface mining operations and surface operations and impacts are incident to an underground coal mine;

(3) which will adversely affect any publicly owned park or place included in the National Register of Historic Places or the Indiana State Register of Historic Sites and Structures or natural landmarks included in the National Register unless approved jointly by the commission and the federal, state, or local agency with jurisdiction over the park or the historic site;

(4) within one hundred (100) feet of the outside right-of-way line of any public road, except where mine access roads or haulage roads join that right-of-way line; however, the commission may permit those roads to be relocated or the area affected to lie within one hundred (100) feet of that road, if, after public notice and an opportunity for a public hearing in the locality, a written finding is made that the interests of

the public and the landowners affected thereby will be protected;

(5) within three hundred (300) feet from any occupied dwelling, unless waived by its owner, any public building, school, church, community, or institutional building, public park, or within one hundred (100) feet of a cemetery; or

(6) which will violate any local zoning ordinance.

(b) If the director determines that the public health or safety will be endangered, the phrase "valid existing rights" shall not apply to the extraction of coal by strip mining methods within the distances for occupied dwellings set forth in subection (a)(5), and public roads set forth in subsection (a)(4), except where a public road is vacated or closed in accordance with law.

(c) The commission shall by rule establish a planning process enabling objective decisions based upon competent and scientifically sound data and information as to which, if any, land areas of Indiana are unsuitable for all or certain types of surface coal mining operations pursuant to the standards set forth in this section, but such designation shall not prevent the mineral exploration pursuant to this article of any area so designated. *As amended by P.L.115-1986, SEC.18.*

13-4.1-14-2 Designation or termination of designation of area as unsuitable; petition; decision

Sec. 2. (a) Any person with an interest which is or may be adversely affected may petition the director to designate an area as unsuitable for surface coal mining operations or to have that designation terminated. The petition shall contain allegations of facts with supporting evidence that tends to establish those allegations.

(b) Within ten (10) months after receipt of the petition, the director shall hold a public hearing in the locality of the affected area, after appropriate notice and publication of the date, time, and location of that hearing. Any person may intervene by filing allegations of facts with supporting evidence that tends to

establish those allegations after the petition is filed and before the hearing. Within sixty (60) days after the hearing, the director shall issue and furnish to the petitioner and any other party to the hearing a written decision regarding the petition and the reasons for that decision.

(c) The director is not required to hold a hearing if all the petitioners stipulate agreement prior to the requested hearing and withdraw their request. *As amended by P.L.169-1983, SEC.5.*

13-4.1-14-3 Preparation of statement of unsuitability

Sec. 3. Prior to designating any land areas as unsuitable for surface coal mining operations, the director shall prepare a detailed statement on:

(1) the potential coal resources of the area;

(2) the demand for coal resources; and

(3) the impact of the designation on the environment, the economy, and the supply of coal.

As added by Acts 1980, P.L.101, SEC.3.

13-4.1-14-4 Basis for designation of unsuitability; grounds; reclamation considerations; integration of land use planning and regulation processes

Sec. 4. (a) The director may designate an area as unsuitable for coal mining if the designation is based on competent and scientifically sound data.

(b) The director may designate an area as unsuitable for certain types of coal mining operations if the operation will:

(1) be incompatible with existing state or local land use plans or programs;

(2) affect fragile or historic lands in which the operation could result in significant damage to important historic, cultural, scientific, and esthetic values and natural systems;

(3) affect renewable resource lands, including aquifers and aquifer recharge areas, in which the operation could result in a substantial loss or reduction of long range productivity of water supply or of food or fiber products; or

(4) affect natural hazard lands, including areas subject to frequent flooding and areas of unstable geology in which the operation could substantially endanger life and property.

(c) The director shall designate an area as unsuitable for all or certain types of surface coal mining if he determines that reclamation pursuant to the requirements of this article is not technologically and economically feasible.

(d) The director shall integrate determinations of the unsuitability of land for surface coal mining with the land use planning and regulation processes at the federal, state, and local levels. *As added by Acts 1980, P.L.101, SEC.3.*

Rule 2. Areas Unsuitable for Mining

310 IAC 12-2-1 Prohibitions, limitations

* * * *

310 IAC 12-2-2 Procedures

Authority: IC 13-4.1-2-1
Affected: IC 13-4.1-3; IC 13-4.1-6; IC 13-4.1-7; IC 13-4.1-8; IC 13-4.1-14

Sec. 2. Procedures. (a) Upon receipt of a complete application for a surface coal mining and reclamation operation permit, the Director shall review the application to determine whether surface coal mining operations are limited or prohibited under 310 IAC 12-2-1 on the lands which would be disturbed by the proposed operations.

(b)(1) Where the proposed operation would be located on any land listed in 310 IAC 12-2-1(a), (f), (g), or (h), the Director shall reject the application if the applicant had no [*sic.*] valid existing rights for the area on August 3, 1977, or if the operation did not exist on that date.

(2) If the Director is unable to determine whether the proposed operation is located with the boundaries of any of the lands in 310 IAC 12-2-1(a), (f), or (g), the Director shall transmit a copy of the relevent [*sic.*] portions of the permit application to the appropriate Federal, State, or local government agency for

a determination or clarification of the relevent [*sic.*] boundaries or distances with a notice to the appropriate agency that it must respond within 30 days of receipt of the request.

(c) Where the proposed operation would include Federal lands within the boundaries of any national forest, and the applicant seeks a determination that mining is permissable under 310 IAC 12-2-1(b), the applicant shall submit a permit application to the OSM Director for processing.

(d) Where the proposed mining operation is to be conducted within 100 feet measured horizontally of the outside right of way line of any public road (except where mine access roads or haulage roads joint such right of way line) or where the applicant proposes to relocate any public road, the Director shall—

(1) Require the applicant to obtain necessary approvals of the authority with jurisdiction over the public road;

(2) Provide an opportunity for a public hearing, at which any member of the public may participate, in the locality of the proposed mining operations for the purpose of determining whether the interests of the public and affected landowners will be protected;

(3) Provide notice in a newspaper of general circulation in the affected locale of a public hearing at least 2 weeks before the hearing, if a hearing is requested;

(4) Make a written finding based upon information received at the public hearing within 30 days after completion of the hearing as to whether the interests of the public and affected landowners will be protected from the proposed mining operations.

(e)(1) Where the proposed surface coal mining operations would be conducted within 300 feet measured horizontally of any occupied dwelling, the applicant shall submit with the application a written waiver from the owner of the dwelling consenting to such operation with a closer distance of the dwelling as specified in the waiver. The waiver must be know-

ingly made and separate from a lease or deed unless the lease or deed contains an explicit waiver.

(2) Where the applicant for a permit after August 3, 1977, had obtained a valid waiver prior to August 3, 1977, from the owner of an occupied dwelling, to mine within 300 feet of such dwelling, a new waiver shall not be required.

(3)(i) Where the applicant for a permit after August 3, 1977, had obtained a valid waiver from the owner of an occupied dwelling, that waiver shall remain effective against subsequent purchasers who had actual or constructive knowledge of the existing waiver at the time of purchase.

(ii) A subsequent purchaser shall be deemed to have constructive knowledge if the waiver has been properly filed in public property records pursuant to state recordation laws.

(f)(1) Where the proposed surface coal mining operations will adversely affect any public park or any publicly owned sites included in the National Register of Historic Places, or the Indiana State Register of Historic Sites or Structures, or publicly owned National Landmarks included in the National Register, the Director shall transmit to the Federal, state or local agency with jurisdiction over the park or publicly owned National Register or State Register site, a copy of the completed permit application containing the following:

(i) A request for that agency's approval or disapproval of the operations;

(ii) A notice to the appropriate agency that it has 30 days from receipt of the request in which to respond. Failure to respond within 30 days shall constitute approval of the proposed permit.

(2) A permit for the operation shall not be issued unless jointly approved by all affected agencies.

(g) If the Director determines that the proposed surface coal mining operation is not prohibited under IC 13-4.1-14 and 310 IAC 12-2-1 and 310 IAC 12-2-2 he or she may, nevertheless,

pursuant to appropriate petitions, designate such lands as unsuitable for all or certain types of surface coal mining operations pursuant to 310 IAC 12-2-3 through 310 IAC 12-2-12.

(h) A determination of the Director that a person holds or does not hold a valid existing right or that surface coal mining operations did nor did not exist on the date of enactment shall be subject to administrative and judicial review as provided in IC 13-4.1. A determination of these issues by the Regional Director concerning any Federal lands or under a Federal program shall be subject to administrative and judicial review under 30 CFR 787.11(c) and 12(b)(2). *(Department of Natural Resources; PT 761.12; filed Sep 28, 1981, 1:30 p.m.: 4 IR 2233; filed May 19, 1982, 3:12 pm: 5 IR 1310; errata, 6 IR 128)*

310 IAC 12-2-3 Criteria

Authority: IC 13-4.1-2-1
Affected: IC 13-4.1-3; IC 13-4.1-6; IC 13-4.1-7; IC 13-4.1-8

Sec. 3. Criteria for Designating Lands as Unsuitable. (a) Upon petition an area shall be designated as unsuitable for all or certain types of surface coal mining operations, if the Director determines that reclamation is not technologically and economically feasible under the Act [*IC 13-4.1*] and these regulations [*310 IAC 12*].

(b) Upon petition an area may be (but is not required to be) designated as unsuitable for certain types of surface coal mining operations, if the operations will —

(1) Be incompatible with existing State or local land use plans or programs;

(2) Affect fragile or historic lands in which the operations could result in significant damage to important historic, cultural, scientific, or esthetic values or natural systems;

(3) Affect renewable resource lands in which the operations could result in a substantial loss or reduction of long-range productivity of water supply or of food or fiber products; or

(4) Affect natural hazard lands in which the operations could substantially endanger life and property, such lands to include areas subject to frequent flooding and areas of unstable geology.

(Department of Natural Resources; PT 762.11; filed Sep 28, 1981, 1:30 pm: 4 IR 2234)

310 IAC 12-2-4 Land exempt from designation

Authority: IC 13-4.1-2-1
Affected: IC 13-4.1-3; IC 13-4.1-6; IC 13-4.1-7; IC 13-4.1-8

Sec. 4. Land Exempt From Designation as Unsuitable for Surface Coal Mining Operations. The requirements of 310 IAC 12-2-3 through 310 IAC 12-2-5 do not apply to —

(a) Lands on which surface coal mining operations were being conducted on August 3, 1977;

(b) Land covered by a permit issued under the Act [*IC 13-4.1*];

(c) Lands where substantial legal and financial commitments in surface coal mining operations were in existence prior to January 4, 1977.

(Department of Natural Resources; PT 762.13; filed Sep 28, 1981, 1:30 pm: 4 IR 2235; errata, 6 IR 127)

310 IAC 12-2-5 Exploration

Authority: IC 13-4.1-2-1
Affected: IC 13-4.1-3; IC 13-4.1-6; IC 13-4.1-7; IC 13-4.1-8; IC 13-4.1-14

Sec. 5. Exploration on Land Designated as Unsuitable for Surface Coal Mining Operations. Designation of any area as unsuitable for all or certain types of surface coal mining operations pursuant to IC 13-4.1-14 and 310 IAC 12-2-1 through 310 IAC 12-2-12 does not prohibit coal exploration operations in the area if conducted in accordance with the Act [*IC 13-4.1*], these regulations [*310 IAC 12*] and other applicable requirements. Exploration operations on any lands designated unsuitable for

surface coal mining operations must be approved by the Director under 310 IAC 12-3-11 through 310 IAC 12-3-17, to insure that exploration does not interfere with any value for which the area has been designated unsuitable for surface coal mining. *(Department of Natural Resources; PT 762.14; filed Sep 28, 1981, 1:30 pm: 4 IR 2235; errata, 6 IR 127)*

310 IAC 12-2-6 Procedures for petition

Authority: IC 13-4.1-2-1
Affected: IC 13-4.1-3; IC 13-4.1-6; IC 13-4.1-7; IC 13-4.1-8; IC 13-4.1-14

Sec. 6. Procedures: Petitions. (a) Right to Petition and Notice. Any person having an interest which is or may be adversely affected has the right to petition the Director to have an area designated as unsuitable for surface coal mining operations, or to have an existing designation terminated.

(b) Designation. A complete petition for designation shall include the following:

(1) The petitioner's name and address and telephone number;

(2) An identification of the petitioned area, including its location and size;

(3) An identification of the petitioner's interest which is or may be adversely affected by surface coal mining operations;

(4) Allegations of fact and supporting evidence which tend to establish that the area is unsuitable for all or certain types of surface coal mining operations; and

(5) A description of how mining of the area has affected or may adversely affect people, land, air, water or other resources.

(c) Termination. A complete petition for termination shall include the following:

(1) The petitioner's name, address and telephone number;

(2) An identification of the petitioned area, including its location and size;

(3) An identification of the petitioner's interests which is or may be adversely affected by the continuation of the designation; and

(4) Allegations of fact, with supporting evidence, not contained in the record of the proceedings in which the area was designated unsuitable, that tend to establish that the designation should be terminated because the reasons for the designation pursuant to the criteria of IC 13-4.1-14 have been significantly diminished or no longer exist.

(Department of Natural Resources; PT 764.13; filed Sep 28, 1981, 1:30 pm: 4 IR 2235; filed May 19, 1982, 3:12 pm: 5 IR 1311)

310 IAC 12-2-7 Initial processing, recordkeeping, and notification

Authority: IC 13-4.1-2-1
Affected: IC 13-4.1-3; IC 13-4.1-6; IC 13-4.1-7; IC 13-4.1-8

Sec. 7. Procedures: Initial Processing, Recordkeeping, and Notification Requirements. (a)(1) Within 45 days of receipt of a petition, the Director shall determine whether the petition is complete, except that for good cause the Director may extend the time for making these determinations for an additional fifteen (15) days.

(2) Complete, for a designation or termination petition, means that the information required under 310 IAC 12-2-6(b) or (c) has been provided.

(3) The Director shall determine whether any identified coal resources exist in the area covered by the petition, without requiring any showing from the petitioner. If the Director finds there are not any identified coal resources in that area, it he shall return the petition to the petitioner with a statement of the findings.

(4) Any petitions received after the close of the public comment period on a permit application relating to the same permit area shall not prevent the Commission from issuing a decision on that permit application. The Director may return any petition received thereafter to the petitioner with statement why the petition cannot be considered. For the purposes of this section, close of the public comment period shall mean the close of any informal conference held under 310 IAC 12-3-109, or, if no conference is requested, at the close of the period for filing written comment and objections under 310 IAC 12-3-107 and 12-3-108.

(5) When the petition is determined complete, the Director shall immediately accept the petition for further processing, and advise the petitioner of this finding by certified mail.

(6) When the Director finds that the petition is generally complete, but that it does not meet this test for portions of the petitioned area, the petition may be accepted in part for further processing in accordance with the procedures set forth below. The Director shall advise the petitioner of those portions of the petitioned area that are not accepted for further processing, with a written statement of reasons.

(7) The Director may reject petitions for designations or terminations of designations which are frivilous, or which were previously and unsuccessfully proposed for designation if it is determined that the new petition presents no new allegations of facts. The Director shall return the petition to the petitioner, with a statement of findings and a reference to the record of the previous designation proceedings where the facts of a previous and unsuccessful petition were considered. Once the requirements of 310 IAC 12-2-6 are met, no party shall bear any burden of proof, but each accepted petition shall be considered and acted upon by the Director pursuant to the procedures of 310 IAC 12-2-6 through 310 IAC 12-2-12.

(8) If the Director determines that the petition is incomplete, or frivilous, he shall return the petition to the petitioner with a written statement of reasons for the determination and the categories of information needed to make the petition acceptable for resubmittal.

(9) The Director shall notify the person who submits a petition of any application for a permit received which proposes to include any area covered by the petition.

(b)(1) Within three weeks after accepting the petition for further processing the Director shall circulate copies of the petition to, and request submission of relevant information from, other interested governmental agencies, the petitioner, interveners, persons with an ownership interest of record in the property, and other persons known to the Director to have an interest in the property.

(2) Within five weeks after accepting the petition for further processing the Director shall notify the general public of the receipt of the petition and request submissions of relevant information by a newspaper advertisement placed once a week for two consecutive weeks in the locale of the area covered by the petition, in a newspaper of general circulation in Marion County, and in the Indiana Register.

(c) Until three (3) days before the Director holds a hearing under 310 IAC 12-2-8, any person may intervene in the proceeding by filing allegations of facts, supporting evidence, a short statement identifying the petition to which the allegations pertain, and the intervener's name, address and telephone number.

(d) Beginning immediately after a complete petition is filed, the Director shall compile and maintain a record consisting of all documents relating to the petition filed with or prepared by the Director. The Director shall make the record available for public inspection, free of charge, and copying at reasonable cost, during all normal business hours at a central location in or near the area where the land petitioned is located, and at the Indianapolis office of the Division of Reclamation. *(Department of Natural Resources; PT 764.15; filed Sep 28, 1981, 1:30 pm: 4 IR 2236; filed May 19, 1982, 3:12 pm: 5 IR 1312; filed Nov 17, 1982, 9:37 am: 6 IR 73; errata, 6 IR 128)*

310 IAC 12-2-8 Hearing requirements

Authority: IC 13-4.1-2-1
Affected: IC 13-4.1-3; IC 13-4.1-6; IC 13-4.1-7; IC 13-4.1-8

Sec. 8. (a) Within ten (10) months after the receipt of a complete petition, the director shall hold a public hearing in the locality of the area covered by the petition. If all petitioners and interveners agree, the hearing need not be held. The director may subpoena witnesses as necessary. A record of the hearing shall be made and preserved, and:

(1) No party shall have the burden of proof or persuasion.

(2) All relevant parts of the data base and inventory system, and public comment received during the public comment period set by the director or at the hearing shall be included in record and considered by the director in deciding the petition.

(b)(1) The director shall give notice of the date, time, and location of the hearing to:

(i) local, state, and federal agencies which may have an interest in the decision on the petition;

(ii) the petitioner and the interveners; and

(iii) any person known by the director to have a property interest in the area covered by the petition.

(2) Notice of the hearing shall be sent by certified mail to petitioners and interveners and by regular mail to other persons involved in the proceedings and postmarked not less than thirty (30) days before the scheduled date of the hearing.

(c) The director shall notify the general public of the date, time, and location of the hearing by placing a newspaper advertisement once a week for two (2) consecutive weeks and once during the week prior to the scheduled date of the hearing in the locale of the area covered by the petition.

(d) The director may consolidate in a single hearing the hearings required for each of several petitions which relate to areas in the same locale.

(e) Prior to designating any land areas as unsuitable for surface coal mining operations, the director shall prepare a

detailed statement, using existing and available information on the potential coal resources of the area, the demand for coal resources, and the impact of such designation on the environment, the economy, and the supply of coal.

(f) In the event that all petitioners and interveners stipulate agreement prior to the hearing, the petition may be withdrawn from consideration. *(Department of Natural Resources; PT 764.17; filed Sep 28, 1981, 1:30 pm: 4 IR 2236; errata, 5 IR 556; filed Mar 7, 1984, 1:40 pm: 7 IR 815, eff Dec 1, 1984)*

310 IAC 12-2-9 Decision

Authority: IC 13-4.1-2-1
Affected: IC 13-4.1-3; IC 13-4.1-6; IC 13-4.1-7; IC 13-4.1-8

Sec. 9. Procedures: Decision. (a) The Director may decide to designate the petitioned land areas in whole or in part, not to designate the petitioned land areas, or to place conditions on future operations in all or part of the petitioned area which would successfully mitigate the impacts of such operations.

(b) In reaching his decision, the Director shall use:

(1) The information contained in the data base and inventory system;

(2) Information provided by other governmental agencies;

(3) The detailed statement prepared under 310 IAC 12-2-8(e); and

(4) Any other relevant information submitted during the comment period.

(c) A final written decision shall be issued by the Director, including a statement of reasons, within 60 days of completion of the public hearing, or, if no public hearing is held, then within 12 months after receipt of the petition accepted for further processing. The Director shall simultaneously send the decision by certified mail to the petitioner and interveners and regular mail to every other party to the proceeding, and to the

Regional Director or the OSM official in charge of the operations in Indiana.

(d) The decision of the Director with respect to a petition, or the failure of the Director to act within the time limits set forth in this Section, shall be subject to judicial review by a court of competent jurisdiction in accordance with State law and these regulations. [*310 IAC 12*]. *(Department of Natural Resources; PT 764.19; filed Sep 28, 1981, 1:30 pm: 4 IR 2237; filed Nov 17, 1982, 9:37 am: 6 IR 74)*

310 IAC 12-2-10 Data base and inventory system requirements

Authority: IC 13-4.1-2-1
Affected: IC 13-4.1-3; IC 13-4.1-6; IC 13-4.1-7; IC 13-4.1-8

Sec. 10. Data Base and Inventory System Requirements. (a) The Director shall develop a data base and inventory system which will permit evaluation of whether reclamation is feasible in areas covered by petitions.

(b) The Director shall include in the system information relevant to the criteria in 310 IAC 12-2-3, including, but not limited to, information received from the United State Fish and Wildlife Service, the State Historic Preservation Officer, and the agency administering Section 127 of the Clean Air Act, as amended (42 U.S.C. Section 7470 et seq.).

(c) The Director shall add to the data base and inventory system information —

(1) On potential coal resources of the state, demand for those resources, the environment, the economy and the supply of coal, sufficient to enable the Director to prepare the statements required by 310 IAC 12-2-8(e); and

(2) That which becomes available from petitions, publications, experiments, permit applications, mining and reclamation operations, and other sources.

(Department of Natural Resources; PT 764.21; filed Sep 28, 1981, 1:30 pm: 4 IR 2237; errata, 6 IR 127)

310 IAC 12-2-11 Public information

Authority: IC 13-4.1-2-1
Affected: IC 13-4.1-3; IC 13-4.1-6; IC 13-4.1-7; IC 13-4.1-8

Sec. 11. The director shall: (a) Make the information and data base system developed under 310 IAC 12-2-10 available to the public for inspection free of charge and for copying at reasonable cost.

(b) Provide information to the public on the petition procedures necessary to have an area designated as unsuitable for all or certain types of surface coal mining operations or to have designations terminated and describe how the inventory and data base system can be used. *(Department of Natural Resources; PT 764.23; filed Sep 28, 1981, 1:30 pm: 4 IR 2238; errata, 6 IR 127; filed Nov 20, 1984, 2:45 pm: 8 IR 308, eff Jun 1, 1985)*

310 IAC 12-2-12 Implementation; responsibility

Authority: IC 13-4.1-2-1
Affected: IC 13-4.1-3; IC 13-4.1-6; IC 13-4.1-7; IC 13-4.1-8

Sec. 12. Responsibility for Implementation. (a) The Director shall not issue permits which are inconsistent with designations made pursuant to these regulations [*310 IAC 12*].

(b) The Director shall maintain a map or other unified and cumulative record of areas designated as unsuitable for all or certain types of surface coal mining operations.

(c) The Director shall make available to any person any information within its control regarding designations, including mineral or elemental content which is potentially toxic in the environment but excepting proprietary information on the chemical and physical properties of the coal. *(Department of Natural Resources; PT 764.25; filed Sep 28, 1981, 1:30 pm: 4 IR 2238)*

No. _____

IN THE

Supreme Court of the United States

October Term, 1989

Indiana Coal Council, Inc., and
Huntingburg Machinery & Equipment
Rental, Inc.,

Petitioners,

v.

Indiana Department of Natural Resources,
Wabash Valley Archaeological Society,
Inc., and Council for the Conservation
of Indiana Archaeology, Inc.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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QUESTION PRESENTED

Whether the state violates the "takings" clause of the Fifth and Fourteenth Amendments when it properly exercises its police power to protect its historical and archaeological heritage from the adverse impacts of surface coal mining by designating a small portion of Petitioners' land unsuitable for surface coal mining and offers Petitioner the alternative (to not mining) of a data preservation plan which substantially advances the same purpose as the mining prohibition.

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STATEMENT OF THE CASE

A.

NATURE OF THE CASE

The Indiana Supreme Court found no violation of the Fifth and Fourteenth Amendments and ordered reinstatement of an Order by the Indiana Department of Natural Resources designating an archaeological site unsuitable for surface coal mining.

Petitioners Indiana Coal Council, Inc. (hereinafter "Coal Council") and Huntingburg Machinery & Equipment Rental, Inc. (hereinafter "HUMER") seek review of the Indiana Supreme Court's reversal of the trial court.

B.

COURSE OF PROCEEDING BELOW

Pursuant to a petition by Wabash Valley Archaeological Society, Inc. ("Wabash Valley") filed in accordance with IND. CODE §13-4.1-14-1 *et seq.* and 310 IND. ADMIN. CODE §12-2-1 *et seq.*, and after a preliminary administrative hearing, the Director of the Department of Natural Resources (the "Director") made an initial determination, on November 19, 1985, that the Beehunter archaeological site was unsuitable for surface coal mining. The Coal Council and HUMER objected and requested a hearing under the former Indiana Administrative Adjudication Act ("AAA"), IND. CODE §4-22-1-1, *et seq.* Wabash Valley and the Council for the Conservation of Indiana Archaeology, Inc. ("CCIA") intervened in support of the Director's action. After an evidentiary hearing, the Director, on January 3, 1986, issued his Findings of Fact and final decision designating the Beehunter Site unsuitable for surface coal mining.

The Coal Council and HUMER sought judicial review of the Director's decision in the Dubois County (Indiana) Circuit Court. On July 28, 1987, the Court entered "Findings and Conclusions," holding that the Director's designation of the Beehunter Site as unsuitable for surface coal mining amounted to an uncompensated "taking" of private property under the Fifth Amendment of the United States Constitution and Article I, §21 of the Indiana Constitution. On November 24, 1987, the trial court denied motions to correct errors in a revised entry also entitled "Findings and Conclusions." On appeal the Indiana Supreme Court reversed the Dubois County Circuit Court.

C.

FACTS RELEVANT TO ISSUES PRESENTED

The Beehunter site, designated unsuitable for surface coal mining by the Director, is a 6.57 acre portion of HUMER's 300 acre farm in Greene County, Indiana [App. A39, Finding 17]. Approximately 55,200 tons of coal are under the Beehunter site; approximately 1,537, 000 tons are under the entire property [App. A42, Finding 37]. The trial court and the Director both found that the archaeological resources of the Beehunter site have unusually important historic, cultural and scientific value [App. A20-22, Findings 20-30; App. A40-42, Findings 24-33], and that if surface coal mining operations are conducted on the site they would destroy those resources [App. A20, Finding 30; App. A42, Finding 34]. Beehunter was nominated and found eligible for listing on the National Register of Historic Places. 51 Fed. Reg. 6677 (1986). The site could be mined by other than surface means in which case sixty percent of the coal beneath Beehunter could be retrieved [App. A23, Finding 38].

The land in question has never been mined for coal. HUMER acquired the land in the 1940's, and it has been farmed since that time. There is no indication the land was acquired with the intent to mine coal. The designation does not prevent HUMER from continuing to farm the land, nor from mining virtually all the coal under the farmland, so long as the coal that lies underneath the site is extracted by means other than surface mining.

As part of his final Order designating the site unsuitable for surface coal mining, the Director also included a "mitigation plan" which provides *one* means by which the unsuitable designation could be removed, [App. A47] yet which would still provide for preservation of the data that is part of the State's cultural heritage. The plan provides for site testing and data recovery conducted by an archaeological contractor after which the area could be surface mined. However, HUMER is not required to carry out the plan nor to expend any money

under it. Further, under the plan HUMER is not required to convey the property or any property right to the State. In fact, HUMER does not need to do anything but may continue to farm the land or mine it by other than surface mining methods. The mitigation plan was provided only as an option to the landowners as *one* way in which they could ultimately surface mine the subject area. The plan simply provides for the preservation of archaeological information from the site prior to its destruction by surface mining; if properly excavated and analyzed, artifacts and other archaeological information could provide valuable knowledge concerning Indiana prehistoric cultures. Although Petitioners characterize this as an extortion plan and imply that the State would prefer this alternative [Petition, p. 6] testimony by the archaeologists at the administrative hearing indicated that because techniques for recovery of such data are constantly improving, the longer data recovery is delayed, the more information would ultimately be recovered from the site. This attempted accommodation to the landowner is *not necessarily* the State's preferred solution. The affect of the Order then is to offer the landowner three alternatives. HUMER can farm its entire property, including the Beehunter site; it can surface mine the coal on its property surrounding Beehunter and mine that site by other (than surface) methods; or it can follow the Director's mitigation plan.

Petitioners submitted a proposed mitigation plan [App. A521] prior to the administrative hearing. Petitioners claim incorrectly that the major difference in plans was that their plan would not have required monetary expenditures by HUMER and would have compensated the landowner for any damage caused by excavation [App. A2]. The Director's plan called for mitigation to be performed by an archaeological contractor who would supply necessary professional and technical personnel, facilities, testing, excavation supplies and materials. The mitigation was to be accomplished in accordance with professional standards and guidelines in two phases consisting of evaluation and data recovery. Significantly, if the testing indicated that no preserved sub-plowzone deposits with

recoverable context existed, the Director could declare the site to be a land *suitable* for surface coal mining and discontinue the investigation, leaving the owner free to mine the property if he or she wished [App. A48, Paragraph B]. If further investigation was indicated, however, it would proceed in a professional manner. The Director's plan, utilizing professional standards, specialized techniques, and careful recording would insure the securing of accurate data and serve to substantially advance the protection of the State's cultural heritage by preservation of the resource information [App. A48-51].

Petitioner's plan or offer, on the other hand, which expired on December 31, 1988 [App. A55, paragraph 12], did not propose *any* method or manner of investigation, did not propose any kind of standards or guidelines, but called for a Project Sponsor, set hours for the conduct of the activities at the site, specified that there would be no cost to HUMER, specified that HUMER be reimbursed for any damages, and set time deadlines [App. A52-56]. HUMER agreed to permit mitigation activities on the site until December 31, 1986, after which it could give notice at any time that it intended to commence mining operations and require that investigatory activities cease [App. A54, paragraph 12]. Additionally, Petitioner's offer was conditioned upon the Director agreeing to find that this "plan" successfully mitigated the impact of all future mining on the Beehunter site and that therefore the site was not unsuitable for surface mining [App. A55, paragraph 13]. No showing was made by Petitioners that its plan would serve in any way to preserve or protect the resource information. However, since the proposed plan expired on December 31, 1988 [App. A55, paragraph 12], there is no outstanding offer, and the issue is moot.

REASONS WHY THE WRIT SHOULD NOT ISSUE

THE INDIANA SUPREME COURT CORRECTLY FOUND THAT THE STATE PROPERLY EXERCISED ITS POLICE POWER

This Court has repeatedly held that the government has considerable latitude in regulating property rights in ways that may adversely affect the owners. *Keystone Bituminous Coal Association v. DeBenedictis* (1987), 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472; *Penn Central Transportation Co. v. New York City* (1987), 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 472. This Court's decisions have established a two-prong test by which determinations with respect to "takings" questions may be measured. *Nollan v. California Coastal Commission* (1987), 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677; *Agins v. Tiburon* (1980), 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106. Under these tests a land use regulation, when applied to a specific piece of property, will not be considered as effecting a taking if the regulation substantially advances a legitimate state interest and does not deprive an owner of the economically viable use of his or her property.

The economic prong of the test is not in dispute. The Director's designation affected only one possible use of a very small portion of the HUMER property. HUMER had approximately 1,537,000 tons of coal beneath its fields, and the Director's decision affected only 6.5 percent of the total. Using undisputed data HUMER stands to earn nearly $1.8 million in coal royalties even if the Beehunter site and the buffer zone are never mined. *See* [App. A22-25, Ct. Fdgs. 33, 48, 49]. Furthermore, the designation does not affect the established use of the property, farming. There is no interference with any of HUMER's "investment-backed expectations." E.g., *Keystone Coal*, 94 L.Ed.2d at 494; *Hodel v. Virginia Surface Mining & Reclamation Ass'n* (1981), 452 U.S. 264, 295. Here, there is absolutely no evidence that HUMER made any investment based on the expectation that either the Beehunter site or the farm as a whole would be mined. Additionally, the owner

showed no reduction in the value of his property. The Indiana Supreme Court correctly decided the designation satisfied the economic prong of the takings test.

With respect to the state interest prong of the test the Indiana Supreme Court has correctly decided that the preservation of the state's cultural heritage was a legitimate state interest well within the legislature's police power to promote the general welfare; and that this interest was substantially advanced by the Director's designation of unsuitability as well as by the optional mitigation plan offered by the state to HUMER.[1] *Nollan* made clear that if the State may constitutionally deny a permit, then a permit with a condition is constitutional so long as the condition advances the same purpose that would justify denial.

> The Commission argues that a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. We agree.

97 L.Ed.2d at 688-89. Moreover, the Court said, such a condition could be lawful even if it required a "permanent grant of continuous access to the property." *Id.* The Court continued, in reasoning directly applicable here:

> If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not.

Id.

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[1]The Indiana Supreme Court noted that the government has the power to enact laws and regulations to promote order, safety, health, morale and the general welfare of society. Court decisions make clear that a broad range of government interests satisfy the legitimacy requirement. *See Agins v. Tiburon* (1980), 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (scenic zoning); *Penn Central*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (landmark preservation); *Barrick Realty, Inc. v. City of Gary*, 491 F.2d 161 (7th Cir. 1974) (maintaining stable integrated neighborhoods).

The reason for the inquiry into the end or goal of the condition, itself, is to "assure that the state does not effect a collateral purpose or end under the guise of a legitimate purpose or end, regulating where it has no right to do so." *Indiana Coal Council et al. v. Indiana Department of Natural Resources, et al* [App. A1-A14]. Petitioners attempt to focus on the mitigation plan in an effort to cast doubt on the State's motives for the designation. However, the mitigation plan offered to HUMER advances the same State interest that would justify an outright prohibition on surface mining — the State's interest in preserving its cultural heritage. The mitigation plan, if carried out, would allow adequate preservation of archaeological data from the site so that present and future generations would be able to study the information.

Simply designating the Beehunter site as an area unsuitable for surface coal mining would have been constitutional. However, because the State offered HUMER an alternative which *would* allow it to surface mine coal (i.e. the mitigation plan), Petitioners attempt to characterize this plan as some kind of extortion plot which unmasks the Director's designation as a taking. Clearly this is not the case, since the mitigation plan is offered as but one alternative for lifting the designation; for example, the relevant statutes and regulations would allow the owner to petition to have the Director remove a designation of unsuitability if circumstances change. *See* 310 IND. ADMIN. CODE §12-2-6(c). The Director's decision does not prohibit Petitioners from seeking such relief in the future. The Director's inclusion of the mitigation plan as an alternative to the prohibition is a *concession* to the owner, not an effort to coerce the owner into subsidizing the acquisition of information. In fact, archaeologist Robert Pace testified at the administrative hearing that because techniques for recovery of archaeological data are constantly improving, the longer data recovery is delayed, the more information would ultimately be recovered from the site [Tr. 201]. While the State cannot force anyone to undertake an archaeological study of the site, the State can try, and is trying, to prevent the total destruction of the site. So

long as the site is not destroyed, there remains the possibility of data recovery and preservation in the future. If the site is surface mined, however, the archaeological resources will be totally and irrevocably destroyed.

Petitioners attempt to present *Nollan* as imposing a new heightened scrutiny test on all land use restrictions. *Nollan* relied on the *Agins* rule that the regulation "substantially advance" a legitimate state interest and held that a condition to remove a land use restriction must also "substantially advance" that interest. *Nollan* at 834, 107 S.Ct. at 3146, 97 L.Ed.2d at 687. A closer examination of the government's purposes did need to be made in the *Nollan* case. However, no matter how or to what extent one scrutinizes the facts in the instant case, it is patently obvious that the mitigation plan substantially advances the exact legitimate state interest as the unsuitability designation, that of preserving the state's cultural heritage.

The Indiana Supreme Court's opinion does not purport to, and does not, deviate from any of this Court's decisions. Rather it faithfully follows them. Nothing in the Indiana Supreme Court's decision warrants review in this Court.

CONCLUSION

For the foregoing reasons, Respondent respectfully urges that the writ of certiorari be denied.

Respectfully submitted,

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No. 89-1026

IN THE

Supreme Court of the United States

October Term, 1989

INDIANA COAL COUNCIL, INC. AND HUNTINGBURG MACHINERY & EQUIPMENT RENTAL, INC.

Petitioners,

vs.

INDIANA DEPARTMENT OF NATURAL RESOURCES, WABASH VALLEY ARCHAEOLOGICAL SOCIETY, INC., AND COUNCIL FOR THE CONSERVATION OF INDIANA ARCHAEOLOGY, INC.

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Indiana

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The primary issue on this Petition is whether the opinion of the Indiana Supreme Court in determining the takings issue, violates *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Petitioners[1] have demonstrated that the Indiana court's opinion thoroughly emasculates *Nollan*. Respondent does not mention, much less discuss, any of these violations of *Nollan*, thereby tacitly admitting the validity of the Petition.

Indeed, by arguing only that the Indiana court reached the right result and totally ignoring the Indiana court's method of analysis, Respondent expressly admits at least two of the Indiana court's conflicts with *Nollan*. First, Respondent acknowledges *Nollan*'s requirement that a condition to removal of a land use restriction, requiring a landowner's consent to an otherwise *per se* take, must at least serve the "same" legitimate state interest as does the restriction itself. [Response at 7] However, the Indiana court at best required that the ends need only be "consistent" with each other. [App. at 9 & 11] Second, Respondent accepts, as it must, that *Nollan* requires a level of judicial scrutiny higher than a rational basis in making the determination of the "same" ends. [Response at 9] Again, the Indiana court simply rejected this requirement's applicability to the case at bar, reasoning that *Nollan*'s heightened scrutiny was applicable only to a condition to the removal of the land use restriction requiring an "actual conveyance of property," and not to conditions requiring consent to other types of *per se* takes. [App. at A10]

Finally, Respondent asserts that regardless of the applicable level of scrutiny the condition and the land use restriction in the case at bar serve the same end — preservation, and argues, using *Nollan*'s required analysis, that the Indiana court reached the right result. However, even the Indiana court found that it was the cultural "knowledge" which enhances the general welfare [App. at A8], which knowledge, of course, is

[1] Petitioners have no parent companies, non-wholly owned subsidiaries or affiliates to list pursuant to Rule 29.1.

only possible through excavation and destruction of the Site. This is not pure preservation. No doubt, the Indiana court's recognition that the ends of the condition and of the land use restriction were not the same, led the Indiana court to adopt the requirement that the ends need only be "consistent" with each other. [App. at A11].

To say that acquisition of the cultural "knowledge" is the "same" as pure preservation, where acquisition of the knowledge requires destruction of the area to be preserved, is to make a mockery of judicial scrutiny regardless of the applicable level of scrutiny. The result reached by the Indiana court, that of *de facto* condemnation of archaeologic knowledge without compensation, cannot be sustained if the dictates of *Nollan* are properly followed and applied.

Based on the many conflicts with *Nollan* and the undisputed national import of the Indiana court's decision pursuant to the 26 other states' statutes under SMCRA, certiorari should be granted.

Respectfully submitted,

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